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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

JAMES R. GLIDEWELL DENTAL
CERAMICS, INC.,

Plaintiff,

vs.

KEATING DENTAL ARTS, INC.,

Defendant.

Case No. SACV11-01309-DOC(ANx)

JAMES R. GLIDEWELL DENTAL CERAMICS, INC.'S STATEMENT OF GENUINE DISPUTES OF MATERIAL FACT AND STATEMENT OF ADDITIONAL MATERIAL FACTS IN RESPONSE TO DEFENDANT KEATING DENTAL ARTS, INC.'S PROPOSED STATEMENT OF UNCONTROVERTED FACTS IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT OF (1) NO INFRINGEMENT OF GLIDEWELL'S REGISTERED TRADEMARK, (2) NO VIOLATION OF SECTION 43(a) OF THE LANHAM ACT, AND (3) NO UNFAIR COMPETITION UNDER CALIFORNIA LAW

Hearing

Date: December 17, 2012
Time: 8:30 a.m.
Ctrm: 9D, Hon. David O. Carter

Pre-Trial Conf.: January 28, 2013
Jury Trial: February 26, 2013

AND RELATED
COUNTERCLAIMS.

HIGHLY CONFIDENTIAL - FILED UNDER SEAL

(PURSUANT TO PROTECTIVE ORDER DATED JANUARY 30, 2012)

STATEMENT OF GENUINE DISPUTES IN RESPONSE TO
PROPOSED STATEMENT OF UNCONTROVERTED FACTS
CASE NO. SACV11-01309 DOC (ANx)

Pursuant to Local Rule 56-2, Plaintiff James R. Glidewell Dental Ceramics, Inc. dba Glidewell Laboratories (“Glidewell”) submits this Statement of Genuine Disputes and Statement of Additional Material Facts in Response to Defendant Keating Dental Arts, Inc.’s (“Keating”) Statement of Uncontroverted Facts and Conclusions of Law in support of its Motion for Summary Judgment of Noninfringement.

Glidewell relies herein on the evidence submitted in support of its Motion for Partial Summary Judgment Re Infringement of a Federally Registered Mark (First Cause of Action) and Dismissal of Defendant’s Second Affirmative Defense and First Counterclaim [Dkt # 81-1] and Motion for Partial Summary Judgment as to Keating Dental Arts, Inc.’s Invalidity Defense and Counterclaim [Dkt #82-1] (“Glidewell’s Motions”), with Glidewell’s Appendix of Evidence in Support of Motions for Summary Judgment [Dkt.# 90] as well as additional evidence submitted herewith. Exhibits are numbered sequentially to those submitted with Glidewell’s Motions.

GLIDEWELL’S STATEMENT OF GENUINE DISPUTES

Proposed Uncontroverted Facts and Conclusions of Law	Plaintiff’s Response
<u>A. Dentists and Dental Restorations (“Crowns”)</u>	
1. Crowns and bridges are dental restorations used by dentists to treat patients with damaged or missing teeth. (Eggleston Decl. ¶ 9).	Not disputed.
2. Dentists order crowns from “dental laboratories” that manufacture the crowns based on specifications provided	Not disputed.

1 by the dentist. (Eggleston Decl. ¶ 9;
2 Belton Decl. ¶ 2; Brady Decl. ¶ 2;
3 Campbell Decl. ¶ 2; Colleran Decl. ¶ 2;
4 Jacquinot Decl. ¶ 2; Murphy Decl. ¶ 2;
5 Myers Decl. ¶ 2; Nussear Decl. ¶ 2;
6 Richardson Decl. ¶ 2; Scott Decl. ¶ 2;
7 Stephens Decl. ¶ 2; Sweet Decl. ¶ 2;
8 Tobin Decl. ¶ 2).

9 3. Crowns and other dental restorations
10 are regulated medical products, and
11 dentists order them from dental
12 laboratories by submitting a prescription
13 form signed by the dentist. (Eggleston
14 Decl. ¶ 9; See also Belton Decl. ¶ 2;
15 Brady Decl. ¶ 2; Campbell Decl. ¶ 2;
16 Colleran Decl. ¶ 2; Jacquinot Decl. ¶ 2;
17 Murphy Decl. ¶ 2; Myers Decl. ¶ 2;
18 Nussear Decl. ¶ 2; Richardson Decl. ¶ 2;
19 Scott Decl. ¶ 2; Stephens Decl. ¶ 2;
20 Sweet Decl. ¶ 2; Tobin Decl. ¶ 2).

21 4. Finished crowns are not staple
22 goods; they are personalized to the
23 patient with custom-shaping and
24 coloring to fit the needs of a particular
25 tooth for a particular patient. (Eggleston
26 Decl. ¶ 9).

27 5. Dentists are highly educated and
28 trained professionals in the business of

Not disputed.

Not disputed.

Not disputed.

patient care. They are responsible for, among other things:

- 1) assessing whether a patient needs a crown;
- 2) assessing the type of crown that is best for the patient;
- 3) creating specifications for the crown personalized to the patient;
- 4) placing an order with a dental laboratory to have the personalized crown made;
- 5) ensuring the crown received from the laboratory is correct and high quality; and
- 6) and affixing crowns in the mouths of their patients.

(Eggleston Decl. ¶ 10-11; See also, Belton Decl. ¶ 2; Brady Decl. ¶ 2; Campbell Decl. ¶ 2; Colleran Decl. ¶ 2; Jacquinet Decl. ¶ 2; Murphy Decl. ¶ 2; Myers Decl. ¶ 2; Nussear Decl. ¶ 2; Richardson Decl. ¶ 2; Scott Decl. ¶ 2; Stephens Decl. ¶ 2; Sweet Decl. ¶ 2; Tobin Decl. ¶ 2).

6. Dentists strive to provide excellent patient care, and in this regard they are careful in choosing the dental laboratories with whom they work.

Disputed. The statement refers to dentists generally but Dr. Eggleston only stated that he is careful in choosing the dental laboratories with whom he

(Eggleston Decl. ¶ 12).

works. [Dkt. #93 (Eggleston Decl., ¶ 12).] In fact, many dentists regard Glidewell's BruxZir brand crowns and Keating's KDZ Bruxer crowns as interchangeable because they have similar features and are generally indicated for the same uses. [Dkt. #90-1 (DiTolla Decl., Ex. I, ¶ 21).]

B. Dental Laboratories

7. There are over 2,000 dental laboratories in the U.S. servicing the needs of dentists. (Jankowski Decl., Ex. 5 (Bartolo Dep. Tr.), at 17:7 – 18:2).

Disputed based on evidentiary objections. See objections to Ex. 5, contained in Glidewell's Evidentiary Objections.

8. Plaintiff Glidewell, founded in 1970, is the largest dental laboratory in the U.S. In 2002, Shaun Keating founded Defendant Keating Dental Arts. (Jankowski Decl., Ex. 6 (Allred Dep. Tr.), at 51).

Disputed based on evidentiary objections. See objections to Ex. 6, contained in Glidewell's Evidentiary Objections.

9. Prior to founding his company, Mr. Keating worked for 18 years at Glidewell. (Keating Decl. ¶ 2).

Not disputed.

10. For decades dental labs primarily manufactured crowns made entirely or partially of porcelain, a material that gives a tooth-like appearance. (Jankowski Decl., Ex. 4 (DiTolla Dep. Tr.), at 34:22 – 42:22; Eggleston Decl.

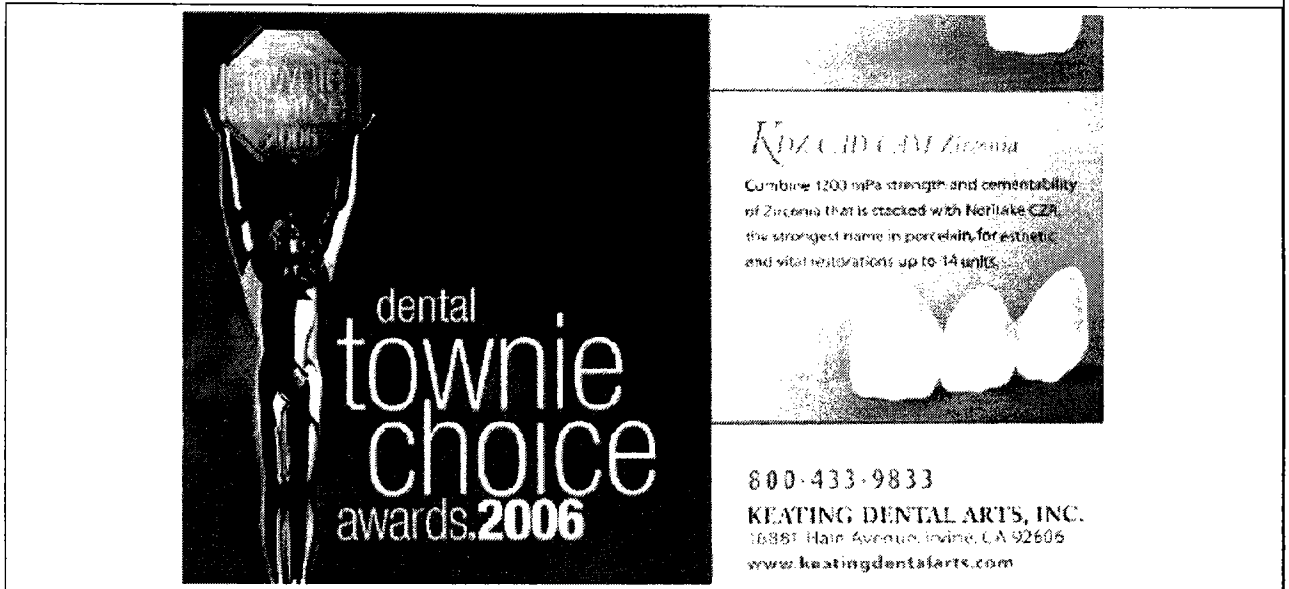
Disputed based on evidentiary objections. See objections to Ex. 4, contained in Glidewell's Evidentiary Objections.

1	¶ 14).	
2	11. Dental labs have developed	Disputed based on evidentiary
3	layered combinations of materials, to	objections. See objections to Ex. 4,
4	create stronger crowns that look tooth-	contained in Glidewell's Evidentiary
5	like. (Jankowski Decl., Ex. 4 (DiTolla	Objections.
6	Dep. Tr.), at 34:22 – 42:22; Eggleston	
7	Decl. ¶ 15).	
8	12. An example of a layered crown	Disputed based on evidentiary
9	developed years ago is a porcelain-	objections. See objections to Exs. 4 and
10	fused-to-metal ("PFM") crown, which	50 contained in Glidewell's Evidentiary
11	includes a top porcelain layer—visible	Objections.
12	in the mouth for aesthetics—atop a	
13	lower hidden metal layer for strength.	
14	(Eggleston Decl. ¶ 15; Jankowski Decl.,	
15	Ex. 4 (DiTolla Dep. Tr.), at 35:15-22;	
16	Mangum Decl., Ex. 50 (Shuck Dep.	
17	Tr.), at 235:3-10).	
18	C. <u>Bruxing Patients and the Development of Zirconia Crowns</u>	
19	13. With regard to dental restorations,	Disputed based on evidentiary
20	a particularly challenging group of	objections. See objections to Exs. 4 and
21	patients for dentists are "bruxers,"	50 contained in Glidewell's Evidentiary
22	patients who subconsciously grind their	Objections.
23	teeth. (Mangum Decl., Ex. 50 (Shuck	
24	Dep. Tr.), at 33:13 – 34:17; Jankowski	
25	Decl., Ex. 4 (DiTolla Dep. Tr.), at 80:10	
26	– 81:10; Eggleston Decl. ¶ 16-17).	
27	14. Bruxers are well known for	Disputed based on evidentiary
28	breaking traditional porcelain crowns	objections. See objections to Exs. 4 and


1 due to the excessive forces they place on	50 contained in Glidewell's Evidentiary
2 their teeth. (Mangum Decl., Ex. 50	Objections.
3 (Shuck Dep. Tr.), at 33:13 – 34:17;	
4 Jankowski Decl., Ex. 4 (DiTolla Dep.	
5 Tr.), at 80:10 – 81:10; Eggleston Decl. ¶	
6 17).	
7 15. Bruxers who have previously	Disputed based on evidentiary
8 broken porcelain crowns have often had	objections. See objections to Exs. 4 and
9 those broken crowns replaced by gold	52 contained in Glidewell's Evidentiary
10 crowns, which are strong and nearly	Objections.
11 unbreakable. (Mangum Decl., Ex. 50	
12 (Shuck Dep. Tr.), at 33:13 – 34:17;	
13 Jankowski Decl., Ex. 4 (DiTolla Dep.	
14 Tr.), at 41:11 – 42:9, 80:10 – 81:10;	
15 Eggleston Decl. ¶ 14, 17; Mangum	
16 Decl., Ex. 52 (Friebauer Dep. Tr.), at	
17 63:21 – 64:20).	
18 16. Despite their excellent functional	Disputed based on evidentiary
19 qualities, gold crowns are typically	objections. See objections to Exs. 4 and
20 unpopular with patients because they do	52 contained in Glidewell's Evidentiary
21 not look like natural teeth. (Jankowski	Objections.
22 Decl., Ex. 4 (DiTolla Dep. Tr.), at 42:5-	
23 16, 52:4-8, 53:4-7, 112:14- 19, 170:1-	
24 13); (Mangum Decl., Ex. 52 (Friebauer	
25 Dep. Tr.), at 64:3-12).	
26 17. Zirconia is an extremely strong	Disputed based on evidentiary
27 material that dental labs began using as	objections. See objections to Ex. 52
28 a substitute for the metal lower layer in	contained in Glidewell's Evidentiary

1	PFM crowns. (Mangum Decl., Ex. 52	Objections.
2	(Friebauer Depo. Tr.), at 50:11-52:6).	
3	18. Although Zirconia is	Disputed based on evidentiary
4	approximately white, it does not have	objections. See objections to Ex. 4
5	the appropriate reflective properties to	contained in Glidewell's Evidentiary
6	appear tooth-like, so it is not as aesthetic	Objections.
7	as porcelain. (Jankowski Decl., Ex. 4	
8	(DiTolla Dep. Tr.) at 35:15-36:2; 61:7-	
9	13).	
10	1. <u>Keating's "KDZ Zirconia" Crown (2006)</u>	
11	19. In 2006, Keating began selling a	Disputed based on evidentiary
12	layered crown with a porcelain top layer	objections. See objections to Ex. 54
13	and a zirconia base, which it variously	contained in Glidewell's Evidentiary
14	called "KDZ," "KDZ Zirconia," or	Objections.
15	"KDZ CAD/CAM Zirconia." (Keating	
16	Decl. ¶ 12; Keating Decl., Ex. A-E;	
17	Mangum Decl., Ex. 54 (Keating Dep.	
18	Tr.), at. 43:15 – 45:12).	
19	20. That year (three years before	Disputed in part. Not disputed that
20	Glidewell came out with its later all-	Keating Dental Arts was named the
21	zirconia crown under the "BruxZir"	"Best Crown and Bridge Laboratory"
22	name), Keating Dental Arts gained	from Dental Town in 2006. Disputed
23	national recognition as "Best Crown and	that this award gained Keating national
24	Bridge Laboratory" from Dental Town,	recognition as the cited evidence makes
25	a dental industry community. (Keating	no reference to national reach.
26	Decl. ¶ 6; Keating Decl., Ex. C).	
27	21. Below is an excerpt from a	Not disputed.
28	Keating brochure from that time.	

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(Keating Decl., Ex. C).	
22. Mr. Keating chose to call his new zirconia product “KDZ” as a reference to “Keating Dental Zirconia.” (Keating Decl. ¶ 12; Mangum Decl., Ex. 53 (Brandon Dep. Tr.), 20:15-16; 26:21-27:4; 38:10-12).	Disputed based on evidentiary objections. See objections to Ex. 53 contained in Glidewell’s Evidentiary Objections.
23. Keating has been selling its layered KDZ crown continuously from 2006 to the present. (Jankowski Decl., Exs. 46-49; Keating Decl. ¶ 12; Mangum Decl., Ex. 54 (Keating Dep. Tr.), at 40:22 – 45:12); Mangum Decl., Ex. 53 (Brandon Dep. Tr.), 20:4-7, 27:15 – 28:4; 26:21 – 27:4).	Disputed based on evidentiary objections. See objections to Exs. 53-54 contained in Glidewell’s Evidentiary Objections.
24. Keating’s layered KDZ crown has been, and remains, Keating’s most popular crown made with zirconia.	Disputed based on evidentiary objections. See objections to Exs. 53-54 contained in Glidewell’s Evidentiary

1 (Keating Decl. ¶ 12; Mangum Decl., Ex,	Objections.
2 54 (Keating Dep. Tr.), at 40:17-19,	
3 41:7-9; Mangum Decl., Ex. 53 (Brandon	
4 Dep. Tr.), 96:14-17, 97:1-2).	
5 2. <u>Glidewell's "BruxZir" Crown (2009)</u>	
6 25. In June 2009, Glidewell began	Disputed based on evidentiary
7 offering for sale an all-zirconia crown	objections. See objections to Ex. 50
8 under the name "BruxZir." (Mangum	contained in Glidewell's Evidentiary
9 Decl., Ex. 50 (Shuck Dep. Tr.) at 15:21-	Objections.
10 16:3; 155:6-8.)	
11 26. Below is an excerpt from a	Not disputed.
12 Glidewell marketing document.	
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17 (Jankowski Decl., Ex. 10 at 1.)	
18 27. Glidewell's mark for the new	Disputed in part. Glidewell disputes
19 crown, "BruxZir," was a composite of	that the placement of the "Z" and the
20 "Brux," with a capital B, and "Zir," with	"x" give the impression that the "Zir"
21 a capital Z. The "Zir" has an italicized	letters are in front of the word "Brux,"
22 font, and the "Z" partially obscures the	as Keating has proffered no evidence,
23 "x" giving the impression that the "Zir"	such as a consumer survey, that supports
24 letters are in front of the word "Brux."	the assertion that consumers in the
25 (<i>Id.</i>) Glidewell's advertising	relevant market have that impression.
26 consistently uses this stylized version of	Glidewell further disputes that the
27 its mark. (Jankowski Decl., Exs. 7-11.)	BruxZir mark is a "composite." TMEP
28	

1		§§1213.05, et seq. Not disputed that in
2		the example offered by Keating, (i)
3		Glidewell's mark for the new crown,
4		"BruxZir," contains the letters "Brux,"
5		with a capital B, and "Zir," with a
6		capital Z, and that (ii) the "Zir" has an
7		italicized font, and the "Z" partially
8		obscures the "x."
9	28. Glidewell markets its BruxZir all-	Disputed based on evidentiary
10	zirconia crowns at industry tradeshow,	objections. See objections to Exs. 50,
11	on its internet website, in dental	79-84 contained in Glidewell's
12	magazines, in brochures mailed to	Evidentiary Objections.
13	dentists, and through e-mail blasts sent	
14	to dentists. (Jankowski Decl., Exs. 7, 9-	
15	11; Mangum Decl., Ex. 50 (Shuck Dep.	
16	Tr.) at 55: 11-20; 57:6-12; 48:18-49:10;	
17	173:5-22; 52:18-54:3; Eggleston Decl.,	
18	Exs. 79-84.)	
19	3. <u>Keating's "KDZ Bruxer" Crown and the KDZ Family (2011)</u>	
20	29. In 2010, in response to requests	Disputed based on evidentiary
21	from its dentist customers, Keating	objections. See objections to Ex. 54
22	began selling a prototype all-zirconia	contained in Glidewell's Evidentiary
23	crown as a substitute for a gold crown.	Objections.
24	(Mangum Decl., Ex. 54 (Keating Dep.	
25	Tr.) at 43:15-44:22.)	
26	30. Dentists began asking for all-	Disputed based on evidentiary
27	zirconia crowns at least partly because	objections. See objections to Ex. 54
28	the cost of gold had increased	contained in Glidewell's Evidentiary

1 significantly in the recent years. 2 (Mangum Decl., Ex. 54 (Keating Dep. 3 Tr.) at 43:15-21; 46:10-47:13.)	Objections.
4 31. Glidewell and Keating each sent 5 letters to their respective 6 dentist/customers to promote all- 7 zirconia crowns as a less expensive 8 replacement for gold crowns. 9 (Jankowski Decl., Ex. 12; Keating 10 Decl., Ex. F.)	Not disputed.
11 32. In 2010 and early 2011, Keating 12 did not advertise an all-zirconia crown, 13 though it sold such crowns to its 14 existing customers who requested them. 15 (Mangum Decl., Ex. 53 (Brandon Dep. 16 Tr.) at 63:8-64:12; Ex. 54 (Keating Dep. 17 Tr.) at 44:12-22.)	Disputed based on evidentiary objections. See objections to Exs. 53-54 contained in Glidewell's Evidentiary Objections.
18 33. Based on the perceived demand 19 of its dentist customers for all-zirconia 20 crowns, Keating decided to formally add 21 an all-zirconia crown to its product 22 offerings. (Mangum Decl., Ex. 54 23 (Keating Dep. Tr.) at 43:15-44:8; 24 Keating Decl., Ex. F.)	Disputed based on evidentiary objections. See objections to Ex. 54 contained in Glidewell's Evidentiary Objections.
25 34. For his new all-zirconia crown, 26 Mr. Keating decided to keep using the 27 "KDZ" prefix that he had been using 28 continuously since 2006 with his	Disputed based on evidentiary objections. See objections to Ex. 54 contained in Glidewell's Evidentiary Objections.

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layered ceramic/zirconia product. (Mangum Decl., Ex. 54 (Keating Dep. Tr.) at 86:13-16; Keating Decl. ¶ 10.)	
35. To avoid confusion with his new all-zirconia offering, Mr. Keating decided to rebrand his existing layered “KDZ Zirconia” crown as the “KDZ Ultra” crown. (Keating Decl. ¶ 12; Mangum Decl., Ex. 53 (Brandon Dep. Tr.) at 26:21-27:4.)	Disputed based on evidentiary objections. See objections to Ex. 53 contained in Glidewell’s Evidentiary Objections.
36. Keating further added another new product made with zirconia to its offerings, which Mr. Keating named the “KDZ Max.” (Keating Decl., Ex. F.)	Not disputed.
37. Because the new all-zirconia crown was specifically designed to replace gold crowns for bruxer patients, Mr. Keating wanted to call the new crown the “KDZ Bruxer.” (Mangum Decl., Ex. 54 (Keating Dep. Tr.) at 83:11- 15).	Disputed. The evidence proffered by Keating does not support the fact for which it is offered, as it does not indicate why Mr. Keating chose to call Keating’s monolithic zirconia crown “KDZ Bruxer.” Further disputed because Keating’s adoption and continued use of the KDZ Bruxer brand despite its knowledge of Glidewell’s BruxZir mark supports a reasonable inference that Keating intended to confuse customers through its promotion of goods under that brand. <i>E. & J. Gallo Winery v. Gallo Cattle Co.</i> ,

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967 F.2d 1280, 1293 (9th Cir.1992);
Ugg Holdings, Inc. v. Severn, 2005 U.S.
Dist. LEXIS 45783 at *27 (C.D. Cal.
Feb. 23, 2005). Keating selected its
KDZ Bruxer mark in the winter or
spring of 2011. By that time,
Glidewell's BruxZir mark was already
well known in the industry; Glidewell
had already spent about REDACTED
promoting its goods under the BruxZir
mark. In connection with its brand
selection process, Keating, among other
things, (1) commissioned a trademark
search report, (2) performed an
"extensive review of dental journal
advertisements by other dental labs," (3)
conducted an "informal trademark
search for 'KDZ' and 'bruxer,'" and (4)
an "informal survey current Keating
clients in March/April 2011" At
least Robert Brandon, Keating's General
Manager of the Laboratory, reviewed
the search report during the brand
selection process. Given that the
BruxZir mark was registered on the
Principal Register in January 2010, the
trademark search report undoubtedly
contained a reference to Glidewell's

BruxZir mark; no other inference is reasonable. Moreover, given the extensive advertising that Glidewell had already conducted under its BruxZir mark, including in numerous dental journals, from 2009 through early 2011, there is overwhelming evidence that Keating was either already aware of Glidewell's BruxZir mark, or became aware of it through the brand selection process, prior to selecting its KDZ Bruxer brand. Furthermore, Keating was informed of the Glidewell BruxZir mark by no later than August 9, 2011, and despite its knowledge of Glidewell's senior mark continued to promote its competing crowns and bridges under the KDZ Bruxer brand. [Dkt. #91-5 (Bartolo Dep. Tr., Ex. 5, at 155:11162:21; Dkt. #90-1 (Wong Decl., Ex. P, ¶ 9), Dkt. #90-30 (Ex 81, (no. 21))]; [Dkt. #90-1 (Wong Decl., Ex. P, ¶ 12), Dkt. #90-30 (Ex. 84, (26:11-20 & 70:23-71:17; Exh. 514; 90:15-25; Exh. 519; 93:19-94:5 and Exh. 520))]; [Dkt. #90-1 (Wong Decl., Ex. P, ¶ 13), Dkt. #90-30 (Ex. 85, (92:14-93:12; 104:24-106:10))]. Disputed based on

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	evidentiary objections. See objections to Ex. 54 contained in Glidewell's Evidentiary Objections.
38. Mr. Keating explained: "We've had our dentists for years always saying, 'What can I use for my grinding patients, my bruxism patients?' And gold is through the roof right now. And every day I'm getting calls, 'What can I do for my bruxer patients? I can't afford the gold.'" (Mangum Decl., Ex. 54 (Keating Dep. Tr.) at 43:17-21.)	Disputed based on evidentiary objections. See objections to Ex. 54 contained in Glidewell's Evidentiary Objections.
39. Mr. Keating sought the advice of counsel to ensure his use of the "KDZ Bruxer" name would not cause problems. (Mangum Decl., Ex. 54 (Keating Dep. Tr.) at 43:17-44:8; Keating Decl. ¶ 10.)	Disputed in part. Not disputed that Mr. Keating sought advice of counsel in connection with the selection of the KDZ Bruxer name. The evidence proffered by Keating does not support the statement that he did so "to ensure his use of the "KDZ Bruxer" name would not cause problems." The evidence cited in Glidewell's response to Keating's SUF 37, incorporated herein by reference, supports a reasonable inference that Keating intended to confuse customers through its promotion of goods under the KDZ Bruxer brand. Disputed based on evidentiary objections. See objections

1		to Ex. 54 contained in Glidewell's
2		Evidentiary Objections.
3	40. A trademark search was	Not disputed that a trademark search
4	performed by counsel and, after	was performed by counsel. Keating,
5	receiving the advice of his counsel, Mr.	however, has so far failed to produce
6	Keating proceeded to name the new	such a trademark search report despite
7	crown the "KDZ Bruxer." (Keating	Glidewell's repeated requests that it do
8	Decl. ¶ 10; Mangum Decl., Ex. 54	so. [Dkt. #90-1 (Wong Decl., Ex. P,
9	(Keating Dep. Tr.) at 43:17-44:8.)	¶2); Dkt. #92-1 (Mangum Decl., Ex. 53
10		(Brandon Dep. Tr.) at 93:4-
11		18).] Disputed based on evidentiary
12		objections. See objections to Ex. 54
13		contained in Glidewell's Evidentiary
14		Objections.
15	41. On March 31, 2011 Keating sent	Disputed in part. When "KDZ Bruxer"
16	a letter to all of its dentist/customers	was formally added, Keating did not
17	referencing the increase in the cost of	have a "line of products," entitled a
18	gold and offering a KDZ family of	"KDZ family of products." Rather,
19	products consisting of:	Keating characterized the addition of
20	• KDZ Bruxer ("Solid Zirconia for	"KDZ Bruxer" as an "expansion of
21	bruxer & grinder patients")	[Keating's] <u>CAD/CAM</u> family of
22	• KDZ Ultra (a rebranding of the	products." (emphasis added). [Dkt.
23	existing KDZ Zirconia product)	#95-6 (Ex. F to Keating Decl.).]
24	and	
25	• KDZ Max (a ceramic pressed	
26	onto a zirconia base) (Keating	
27	Decl. ¶ 9, Ex. F.)	
28	42. In May 2011, Keating began	Disputed in part. Keating's evidence

marketing its new KDZ family using the following stylized marks, which it has been using continuously since:

does not support the statement that marketing of the “new KDZ family” began in May 2011.



(Keating Decl. ¶ 11.)

43. The most prominent part of Keating’s mark for its new crown is the prefix “KDZ.” Following is a second word (“Bruxer,” “Ultra,” or “Max”) in a smaller font, sometimes in all caps and sometimes lower case with a capital first letter. (*Id.*)

Disputed in part. Not disputed that the “KDZ” prefix is bolded and in larger font than the second word (“Bruxer,” “Ultra,” or “Max”) in each of Keating’s cited three examples. Disputed that Keating uses “Ultra” or “Max” with its “new crown,” which presumably refers to a full contour zirconia crown. Disputed that the most prominent part of the KDZ Bruxer mark is “KDZ,” because in addition to the examples submitted by Keating the company also presents the mark to consumers in a format in which “KDZ” and “Bruxer” are in the same font. In the text of its advertisements the term is no more prominent than the “Bruxer” root of its mark. [Dkt. #90-1 (DiTolla Decl., Ex. I, ¶ 15), Dkt. #90-24 (Ex. 76)].

44. Keating presents its KDZ Bruxer

Disputed in part. Not disputed that the

1 2 3 4 5 6 7 8 9 10 11 12	product as originating from Keating Dental Arts, with no affiliation to Glidewell or any other dental laboratory. The advertisement that Glidewell attached as Exhibit B to the Complaint is typical: “Introducing the all-new KDZ Bruxer. The best full-contour zirconia solution available. <i>Exclusively from Keating Dental Arts.</i> ” (Jankowski Decl., Ex. 45 (emphasis added).)	cited Keating KDZ Bruxer advertisement states that it is from Keating Dental Arts. Disputed that Keating consistently presents its KDZ Bruxer product as originating from Keating Dental Arts, or that the cited KDZ Bruxer advertisement is typical. Furthermore, Keating produced other advertisements that did not indicate that KDZ Bruxer was exclusively from Keating Dental Arts. [Dkt. #90-30 (Wong Decl. ¶ 11, Ex. 84 (KDA869)).]
13 14 15 16 17 18	45. Keating markets its KDZ Bruxer all-zirconia crowns at industry tradeshow, on its internet website, in dental magazines, and in brochures mailed to dentists. (Jankowski Decl., Exs. 46, 47, 49; Keating Decl., Ex. D.)	Not disputed.
19 20 21 22 23 24 25 26 27 28	46. Dentists interpret the “KDZ” in Keating’s marks as a reference to “Keating Dental Zirconia.” (Stephens Decl. ¶ 10; Campbell Decl. ¶ 6.)	Disputed. Dr. Stephen and Dr. Campbell’s declarations demonstrate only that those two dentists understood the “KDZ” in Keating’s marks as a reference to Keating Dental Zirconia, but not that dentists generally do so. [Dkt. #107 (Stephens Decl., ¶ 10); Dkt. #99 (Campbell Decl., ¶ 6).] In addition, Dr. Campbell’s declaration reveals that he referring to a KDZ-branded crown

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	made of porcelain fused to metal that he ordered in May 2009, not to a KDZ Bruxer crown. Keating has proffered no evidence that any dentists other than Drs. Stephen and Campbell have ever interpreted the KDZ as a reference to “Keating Dental Zirconia.” Disputed based on evidentiary objections. See objections Declaration of Dr. Scott Stephens contained in Glidewell’s Evidentiary Objections.
D. <u>Glidewell’s “BruxZir” Mark Is Weak At Best</u>	
1. <u>“BruxZir” Is Generic Or At Least Highly Descriptive</u>	
47. Glidewell named its all-zirconia crown “BruxZir” because it is a zirconia crown for bruxers. (Jankowski Decl., Ex. 3 at 6; Ex. 4 (DiTolla Dep. Tr.) at 85:15-87:5; Ex. 5 (Bartolo Dep. Tr.) at 71:19-72:5; Ex. 18; Mangum Decl., Ex. 50 (Shuck Dep. Tr.) at 41:1-13; Ex. 52 (Friebauer Dep. Tr.) at 72:1-4.)	Disputed. The name was chosen in large part because it suggested the primary characteristics of the product: that it was sufficiently strong and durable to be used in a variety of applications, including treating patients with bruxism (“Brux”), and that the material from which the crown was fashioned is zirconia (“Zir”). [Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 9); Dkt. #90-1 (Goldstein Decl., Ex. O, ¶ 17); Dkt. #90-1 (Franklyn Decl., ¶ 42); Dkt. 90-1 (Declaration of Rudy Ramirez, Exhibit H to the Appendix of Evidence (“Ramirez Decl.”) ¶ 4); Supplemental

1		Declaration of Dr. Ronald Goldstein,
2		Ex. X to the Appendix of Evidence, ¶
3		3.] Disputed based on evidentiary
4		objections. See objections to Exs. 4, 5,
5		50, 52 contained in Glidewell's
6		Evidentiary Objections.
7	48. Since 2009, Glidewell has	Disputed. In addition to marketing
8	marketed its all-zirconia crown at	BruxZir brand crowns for use with
9	dentists and dental labs for use with	bruxer patients, Glidewell has also
10	bruxer patients. (Mangum Decl., Ex. 50	marketed the BruxZir brand crowns as
11	(Shuck Dep. Tr.) at 87:18-88:7; 176:19-	"More brawn and improving beauty,"
12	178:22; Jankowski Decl., Ex. 7 at 2, 9,	with no mention of treating bruxism.
13	20; Ex. 8 at 1-9; Ex. 9 at 2; Ex. 10 at 3,	[Dkt. #90-1 (Shuck Decl., Ex. G to
14	12, 23, 26; Ex. 11 at 1, 3, 5-6; Ex. 12;	Glidewell's Appendix of Evidence) Dkt
15	Ex. 13; Ex. 14 at 5, 17, 19; Ex. 15 at 5;	# 90 at 19.] Disputed based on
16	Ex. 16 at 3; Eggleston Decl., Exs. 79-	evidentiary objections. See objections
17	84.)	to Exs. 15, 16, 50, 79-84 contained in
18		Glidewell's Evidentiary Objections.
19	49. The name BruxZir is phonetically	Disputed. Keating's evidence does not
20	equivalent to "bruxer," the term for a	support this alleged statement of
21	person with bruxism. (Eggleston Decl.,	fact. First, in Dkt. #93-1 (Eggleston
22	Ex. 65 at 14-16; Van Hoosear Decl.,	Decl., Ex. 65, at 16), Dr. Eggleston does
23	Exs. V-1 through V-4; Stephens Decl., ¶	not even discuss Dr. DiTolla or his
24	12; Scott Decl., ¶ 11; Colleran Decl., ¶	videos. Rather, Dkt. #93-1 (Eggleston
25	12; Jacquinet Decl., ¶ 11; Nussear	Decl., Ex. 65, at 16) primarily focuses
26	Decl., ¶ 11; Jankowski, Ex. 6 (Allred	on Dr. Eggleston's opinion on the
27	Dep. Tr.) at 220:5-12; 229:5-8; Ex. 24 at	subject matter of "Dentists and other
28	5; Ex. 25 at 1; Ex. 30 at 4; Frattura	professionals in the dental profession

Decl., ¶ 15.)

refer to an all zirconia crown as a “bruxer crown” or alternatively a “bruxzir crown.” Second, in Dkt. #110 (Van Hoosear Decl., Ex. V-4), there were no instances of Dr. DiTolla’s pronunciation of the term “bruxer.” Rather, in Dkt. #110 (Van Hoosear Decl., Ex. V-4), Dr. DiTolla only pronounces the term “BruxZir” throughout this video. Disputed based on evidentiary objections. See objections to Exs. V-4, 6, and Stephens Decl., ¶ 12; Scott Decl., ¶ 11; Colleran Decl., ¶ 12; Jacquinet Decl., ¶ 11; Nussear Decl., ¶ 11 contained in Glidewell’s Evidentiary Objections.

2. The Widespread Use of “Brux” and “Zir” In The Dental Industry

50. In addition to Glidewell and Keating, many other companies have been using “Brux” to refer to dental products for use with bruxers and “Z” or “Zir” to refer to dental products associated with zirconia. (Eggleston Decl., Ex. 65 at 16-18; Ex. 66 at 3-7; Ex. 68 at 3-5.) Examples include:

- Arthtek Bruxing Splint (Eggleston Decl., Ex. 121)
- GPS BruxArt (Eggleston Decl.,

Disputed. Keating has failed to proffer any admissible evidence in support of this purported fact, for at least the following reasons: (1) all of the exhibits submitted in support of the referenced “uses” constitute print-outs of webpages that are not authenticated and are therefore not admissible, *Orr v. Bank of Am.*, 285 F.3d 764, 773-79 (9th Cir. 2002); *In re Homestore.com, Inc. Sec. Litig.*, 347 F. Supp. 2d 769, 782-83

- 1 Ex. 114)
- 2 • BruxChecker (Eggleston Decl.,
- 3 Ex. 122)
- 4 • Brux-eze (Eggleston Decl., Ex.
- 5 124)
- 6 • BruxCare (Eggleston Decl., Ex.
- 7 125)
- 8 • Bruxguard (Eggleston Decl., Ex.
- 9 126)
- 10 • Dr. Brux (Eggleston Decl., Ex.
- 11 123)
- 12 • ZirCAD (zirconia blocks)
- 13 (Eggleston Decl., Ex. 129)
- 14 • ZirColor (coloring product for
- 15 zirconia) (Eggleston Decl., Ex.
- 16 135)
- 17 • ZirPress (for ceramic ingots)
- 18 (Eggleston Decl., Ex. 130)
- 19 • ZirLiner (zirconia bonding
- 20 material) (Eggleston Decl., Ex.
- 21 131)
- 22 • Zir-Cut (zirconia polisher)
- 23 (Eggleston Decl., Ex. 127)
- 24 • ZirBlock (dental products)
- 25 (Eggleston Decl., Ex. 128)
- 26 • Zirprime (pre-sintered zirconia)
- 27 (Eggleston Decl., Ex. 132)
- 28 • Zir.Care (multipurpose stone)

(C.D. Cal. 2004); Fed. R. Evid. 901, (2) all of the webpages constitute inadmissible hearsay, as they are offered for the truth of the matter asserted, Fed. R. Evid. 802; and (3) any other reason identified in Glidewell's Objections to Keating's Evidence, all of which are incorporated herein by reference.

Disputed that "many" other companies have been using "Brux" to refer to dental products for use with bruxers and "Z" or "Zir" to refer to dental products associated with zirconia, as Keating's cited web-site printouts in SUF 50 identify only 16 such companies. [Franklyn Supp. Decl., Ex. T, ¶¶ 39-42.] There are just as many labs that do not use "Brux" or "Zir" to market their zirconia crowns:

- LUNA Translucent Zirconia Crowns (Mallgrave Decl., Ex. 98)
- BIOCAD Solid Zirconia (Mallgrave Decl., Ex. 99)
- ORIGIN® FC Zirconia (Mallgrave Decl., Ex. 100)
- LAVA™ Zirconia (Mallgrave Decl., Ex. 101)

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<p>(Eggleston Decl., Ex. 133)</p> <ul style="list-style-type: none"> • ZiReal (Zr dental posts) <p>(Eggleston Decl., Ex. 134)</p>	<ul style="list-style-type: none"> • Nautilus Full-Contour (Mallgrave Decl., Ex. 102) • Full Zirconia Crowns (Mallgrave Decl., Ex. 103) <p>Still other labs that market zirconia crowns with a Z, but their names are clearly different from BruxZir:</p> <ul style="list-style-type: none"> • Z Crown™ Solid (Mallgrave Decl., Ex. 104) • ADT FZ (Mallgrave Decl., Ex. 105) • Z-Crown (Mallgrave Decl., Ex. 106) • NuSmile ZR Zirconia (Mallgrave Decl., Ex. 107) • 360Zr (Mallgrave Decl., Ex. 108) • CAP FZ (Mallgrave Decl., Ex. 109) • TLZ Zirconia (Mallgrave Decl., Ex. 110) <p>Disputed based on evidentiary objections. See objections to Ex. 66 contained in Glidewell's Evidentiary Objections.</p>
<p>3. <u>All-Zirconia Crowns Offered By Other Dental Laboratories</u></p>	
<p>51. In addition to Glidewell and Keating, many other dental laboratories</p>	<p>Disputed. Keating has failed to proffer any admissible evidence in support of</p>

1 have been offering all-zirconia crowns
2 under a variety of names, including
3 names with “Brux,” “Zir,” or variations
4 thereon. (Eggleston Decl., Ex. 66 at 3-7;
5 Ex. 68 at 3-5.) Examples include:

- 6 • Advanced Dental Lab — BruxZir
7 (Jankowski Decl., Ex. 31.)
- 8 • Assured Dental Lab — Z-Brux
9 (Jankowski Decl., Ex. 28.)
- 10 • Authentic Dental Lab — Brux
11 (Jankowski Decl., Ex. 27.)
- 12 • Barth Dental Lab — “Z-Brux”
13 (Jankowski Decl., Exs. 34 & 37.)
- 14 • Burbank Dental — “Zir-Max”
15 (Eggleston Decl., Ex. 99.)
- 16 • California Dental Arts — “ZirFit”
17 (Eggleston Decl., Ex. 103.)
- 18 • CDLLab – ZerisBRUX
19 (Eggleston Decl., Ex. 109.)
- 20 • China Dental Outsourcing —
21 “Bruxer All Zirconia” (Jankowski
22 Decl., Ex. 29.)
- 23 • China Dental Outsourcing — All
24 Zirconia for Bruxers (Jankowski
25 Decl., Ex. 39.)
- 26 • Continental Dental — “Full
27 Zirconia for Bruxing Patients”
28 (Eggleston Decl., Ex. 112.)

this purported fact, for at least the following reasons: (1) all of the exhibits submitted in support of the referenced “uses” constitute print-outs of webpages and third party prescription forms that are not authenticated and are therefore not admissible, *Orr v. Bank of Am.*, 285 F.3d 764, 773-79 (9th Cir. 2002); *In re Homestore.com, Inc. Sec. Litig.*, 347 F. Supp. 2d 769, 782-83 (C.D. Cal. 2004); Fed. R. Evid. 901, (2) all of the webpages and prescription forms constitute inadmissible hearsay, as they are offered for the truth of the matter asserted, Fed. R. Evid. 802; and (3) any other reason identified in Glidewell’s Objections to Keating’s Evidence, all of which are incorporated herein by reference. Disputed that the 29 examples of dental laboratories purportedly offering all-zirconia crowns under particular brands constitute “many” such examples. [Franklyn Supp. Decl., Ex. T, ¶¶ 39-42.]

Disputed that the following dental laboratories continue to offer products under the brands referenced in SUF 51:

- Cosmetic Dentistry of SA — “Bruxer Crown” (Eggleston Decl., Ex. 119.)
- Dani Dental — “Full Zirconia (Bruxer)” (Jankowski Decl., Ex. 43.)
- Diadem Precision Technology — “Diazir” (Eggleston Decl., Ex. 101.)
- Drake Dental — “Zir-Cast” (Eggleston Decl., Ex. 96.)
- Expertec — “Full-Z” (Eggleston Decl., Ex. 93.)
- Fusion Dental Lab — “Full Solid Bruxer Zirconia” (Jankowski Decl., Ex. 24.)
- GPS Dental Lab — “GPS BruxArt” (Eggleston Decl., Ex. 114.)
- Infinity Dental Lab — Bruxer Crowns (Eggleston Decl., Ex. 108.)
- Kastle Mills — “ZirCrown” (Eggleston Decl., Ex. 100.)
- Mascola Esthetics — “Xtreme Bruxer” (Eggleston Decl., Ex. 110.)
- Pittman Dental — “ZirCAM”

- Assured Dental Lab — Z-Brux
 - Authentic Dental Lab-Brux
 - China Dental Outsourcing — “Bruxer All Zirconia”
 - Continental Dental — “Full Zirconia for Bruxing Patients”
 - Pittman Dental — Bruxer Crown
 - Somer Dental Labs — “Full Contour Zir”
 - Trachsel Dental — “All Zirconia Bruxer”
 - York Dental Lab — “Bruxer”
- [Supplemental Declaration of David Franklyn, Exhibit T to the Appendix of Evidence filed concurrently herewith, ¶¶ 43-54, Exs. 89-96]; [Supplemental Declaration of Dr. Richard Goldstein, Exhibit X to the Appendix of Evidence, ¶ 11.]

Disputed that China Dental Outsourcing (“All Zirconia for Bruxers”) and Continental Dental (“Full Zirconia for Bruxing Patients”) have been offering product under the referenced names, as these companies do not appear to use these phrases to denote a particular

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- (Eggleston Decl., Ex. 106.)
- Pittman Dental — Bruxer Crown (Eggleston Decl., Ex. 120.)
 - Somer Dental Labs — “Full Contour Zir” (Eggleston Decl., Ex. 104.)
 - Summers Dental Lab — “BruxThetix” (Eggleston Decl., Ex. 113.)
 - Sun Dental Labs — “Suntech Full Zirconia” (Eggleston Decl., Ex. 94.)
 - Technics Dental Lab — “Tech/ZIR FC” (Eggleston Decl., Ex. 105.)
 - Trachsel Dental — “All Zirconia Bruxer” (Jankowski Decl., Ex. 42.)
 - York Dental Lab — “Bruxer” (Eggleston Decl., Ex. 111.)
 - Zahn Dental — “Zirlux” (Eggleston Decl., Ex. 102.)

source of goods.

Disputed that Cosmetic Dentistry of SA (which appears to be a dental office rather than a dental laboratory), Infinity Dental Lab, and Pittman Dental have been offering product under the referenced names ““Bruxer’ crown” or “Bruxer crowns,” as it is not clear from Keating’s evidence that these terms are used to denote a source of goods.

Disputed that Dani Dental has been offering product under the referenced name, as Keating’s evidence consists of a preprinted prescription form that includes a box next to the term “Full Zirconia (Bruxer);” therefore this evidence is deficient for at least the reasons that (i) it is not probative concerning whether or how this company markets or offers any of its goods to dentists, and (ii) it is unclear from this form whether these words are used to denote a source of goods sold under the mark rather than merely descriptively to refer to a full zirconia crown that could be used for a patient

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with bruxism.

Disputed that Mascola Esthetics and Trachsel Dental Studio have been offering product under the referenced names. Keating's evidence consists of preprinted prescription forms that are not probative concerning whether or how these companies market or offer any of their goods to dentists.

Disputed that Zahn Dental has been offering product under the referenced name. Keating's evidence consists of an advertisement for a Zirlux lecture and demonstration, not for the product itself.

Disputed that Summers Dental Lab has been offering product under the referenced name. Keating's evidence consists of an advertisement for Drake Precision Zir-Cast BruxZir, with no mention of Summers Dental Lab.

Disputed that Somer Dental Labs has been offering product under the referenced name. Keating's evidence consists of what appears to be a post on

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its website, and it is not clear that the product was offered for sale.

Disputed that GPS Dental Lab has been offering product under the referenced name. Keating's evidence consists of what appears to be a screen shot of a website, but it does not indicate the name of the lab on the page.

"Z-Brux" (Assured Dental Lab), "Brux" (Authentic Dental), "Bruxer All Zirconia" (China Dental Outsourcing), "Full Solid Bruxer Zirconia" (Fusion Dental Lab), "Bruxer Crown" (Pittman Dental), "Full Contour Zir" (Somer Dental Labs) were discontinued after the dental labs that used those names received cease and desist letters from Glidewell's General Counsel. [Supplemental Declaration of Keith Allred, Exhibit W to the Appendix of Evidence, ¶ 6.]

"Full Zirconia for Bruxing Patients" (Continental Dental), "All Zirconia Bruxer" (Trachsel Dental) and "Bruxer" (York Dental Lab) – have been

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	<p>discontinued, and in any event all of these labs are or shortly will be Glidewell-authorized laboratories. Continental Dental and Trachsel Dental are authorized labs that inadvertently used incorrect language in their marketing materials; Glidewell notified the labs of the incorrect use and they corrected it. [Supplemental Declaration of Jim Shuck, Exhibit R to the Appendix of Evidence, ¶ 14.] York Dental Lab is in the process of being authorized. [<i>Id.</i>, ¶ 15.]</p>
<p>4. <u>Glidewell’s “Authorized” Labs Sell “BruxZir” Crowns, Most of Which Do Not Identify Glidewell As An Affiliated Entity</u></p>	
<p>52. Glidewell makes zirconia “blanks” (the raw material from which zirconia crowns may be made) which it sells to about 180 “authorized” dental laboratories for use by those laboratories in making their own all-zirconia crowns. (Mangum Decl., Ex. 50 (Shuck Depo. Tr.) at 45:11-46:18; Ex. 51 (Carden Depo. Tr.) at 85:5-86:6; 208:4-10)</p>	<p>Not disputed that Glidewell makes BruxZir zirconia blanks which it sells to about 180 authorized dental laboratories in the United States for use by those laboratories in making all-zirconia crowns. Disputed based on evidentiary objections. See objections to Exs. 50-51 contained in Glidewell’s Evidentiary Objections.</p>
<p>53. Glidewell’s “authorized” laboratories make and sell crowns using the “BruxZir” name, in the same manner as does Glidewell. (Mangum Decl., Ex.</p>	<p>Disputed in part. Not disputed that at least some of Glidewell’s authorized laboratories make and sell crowns under the BruxZir name, in the same manner</p>

1 50 (Shuck Depo. Tr.) at 45:11-46:13;
2 Ex. 51 (Carden Depo. Tr.) at 208:16-
3 209:2; Eggleston Decl., Ex. 66 at 4-5;
4 Exs. 136-137.)
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as does Glidewell. Disputed that all authorized laboratories sell crowns using the BruxZir name. The evidence proffered by Keating does not support this statement: Shuck and Carden's cited deposition transcripts do not refer to authorized labs selling crowns under the BruxZir name, and Dr. Eggleston's referenced report notes that Glidewell's authorized labs commonly identify their zirconia restorations generically as "Zirconia" (see, e.g., Rx forms for Dentek Dental Laboratory; ROE Dental Laboratory; TLC Dental Laboratory; Womson-Polzin Dental Laboratory), 'Full Zirconia' (see, e.g., Rx form for Ziemek Laboratories), 'Full Contour Zirconia' (see, e.g., Rx forms for Iverson Dental Laboratories and Parkway Dental Lab), 'Full Crown,' 'Ceramics' (see, e.g., Rx form for Great Southwest Dental Laboratory), 'All Ceramic' (see, e.g., Rx forms for Eclipse Dental and Elegant Dental Laboratories), or 'Monolithic Zirconia' (see, e.g., Rx forms for Las Vegas Dental Studio and Lord's Dental Studio). Some of these 'authorized'

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	prescription forms refer to their all zirconia restorations as ‘Bruxzir’ (with a lower case z) (<i>see, e.g.</i> , Rx forms for Midtown Dental Laboratory and R-dent Dental Laboratory), or ‘BRUXZIR’ (all capital letters) (<i>see, e.g.</i> , Rx forms for Artistic Dental Lab; Continental Dental Laboratory; DentalLab.com).” Dkt. #93-2 (Eggleston Decl., Ex. 66, at 4-5). Disputed based on evidentiary objections. See objections to Exs. 50-51 contained in Glidewell’s Evidentiary Objections.
54. Most of Glidewell’s “authorized” laboratories have web sites promoting their “BruxZir” crowns, often with the same language used in Glidewell’s marketing materials. (Eggleston Decl., Ex. 66 at 4-5; Exs. 136-137.)	Disputed. Evidentiary objection based on inadmissible third party websites. See objections to Exhs. 66, 136-137 contained in Glidewell’s Evidentiary Objections.
55. The vast majority of Glidewell’s “authorized” laboratories do not identify Glidewell as an affiliated entity. Instead, they typically promote the BruxZir crown as their own crown coming from their own dental laboratory. (<i>Id.</i>)	Disputed. Evidentiary objection based on inadmissible third party websites. See objections to Exhs. 66, 136-137 contained in Glidewell’s Evidentiary Objections.
56. Glidewell does not monitor the use of the BruxZir mark by its “authorized” labs, and it does not	Disputed. Glidewell does monitor the use of the BruxZir mark by Glidewell’s authorized labs. [Dkt. #91-6 (Allred

1 require those labs to identify Glidewell
2 as an affiliated entity. (Jankowski Decl.,
3 Ex. 5 (Bartolo Dep. Tr.) at 63:12-68:13;
4 69:9-14; 178:11-180:10; Ex. 6 (Allred
5 Dep. Tr.) at 142:2-143:8; Mangum
6 Decl., Ex. 50 (Shuck Dep. Tr.) at 45:11-
7 46:18.)

Dep. Tr., Ex. 6, at 142:4-10);
Supplemental Declaration of Robin
Bartolo, Ex. V to the Appendix of
Evidence, ¶¶ 4-21; Supplemental
Declaration of Robin Carden, Exhibit U
to the Appendix of Evidence, ¶¶ 2-13.]
Keating's evidence does not show that
Glidewell does not monitor the use of
the BruxZir mark by its authorized labs,
instead, Glidewell provides detailed
instructions for authorized labs to
follow, such as sintering cycle
guidelines. [Dkt. #91-5 (Bartolo Dep.
Tr., Ex. 5, at 65:17-22, 66:1-11).]
Glidewell also gives technical bulletins
to the authorized labs to convey specific
guidelines. [Dkt. #91-5 (Bartolo Dep.
Tr., Ex. 5, at 67:4-16).] Furthermore,
Glidewell monitors the practices
authorized labs are following to create
the full-contour restorations. [Dkt. #92-
1 (Carden Depo., Ex. 51, at 209:19-22).]
Glidewell has an extensive certification
process labs need to go through to
become an authorized lab. Glidewell
also asks labs to send samples back to
Glidewell to make sure they are
sintering correctly. [*Id.* 210-212.]

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	<p>Glidewell personnel pay visits to the authorized lab facilities. [<i>Id.</i> 212:8-10.] In addition, the cited evidence does not demonstrate that Glidewell does not require those labs to identify Glidewell as an affiliated entity. Glidewell sends email updates to Authorized Labs containing improvements to the manufacturing techniques used for the BruxZir brand crowns. [Shuck Supp. Decl., Ex. R, ¶ 13.] Disputed based on evidentiary objections. See objections to Exs. 5, 6, 50 contained in Glidewell’s Evidentiary Objections.</p>
<p>5. <u>Dentists Use The Term “BruxZir” Generically</u></p>	
<p>57. Up through May 2012, Keating had fulfilled over 5,000 prescription forms by supplying its dentist customers with the KDZ Bruxer product. (Mangum Decl., Ex. 53 (Brandon Dep. Tr.) at 60:13-17; 66:3-7; 68:6- 8; Ex. 55; Ex. 56 (native Excel spreadsheet from which Ex. 55 was created); Ex. 57; Ex. 58 (native Excel spreadsheet from which Ex. 57 was created); Ex. 63; Ex. 64 (native Excel spreadsheet from which Ex. 63 was created).)</p>	<p>Disputed based on evidentiary objections. See objections to Exs. 53, 55, 56, 57, 58, 63, 64 contained in Glidewell’s Evidentiary Objections.</p>
<p>58. Over that span, dentists (or their</p>	<p>Disputed. REDACTED</p>

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assistants) wrote the word “BruxZir,”
“bruxzir,” or variations thereof, on
about 75 of the prescription forms
requesting Keating’s all-zirconia crown.
(Mangum Decl., Ex. 53 (Brandon Dep.
Tr.) at 56:23-57:6.)

REDACTED

REDACTED See objections to Ex. 53
contained in Glidewell’s Evidentiary

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	Objections.	
59. The prescription forms received with these spellings constitute about 1.5% of the total number of prescription forms received by Keating for its all-zirconia crown. (Mangum Decl., Ex. 53 (Brandon Dep. Tr.) at 68:9-11.)	Disputed.	REDACTED REDACTED
60. When receiving prescription forms with such misspellings, Keating implemented a policy of calling the dentist to confirm that the dentist wanted Keating's all-zirconia crown rather than a crown from another laboratory. (Mangum Decl., Ex. 53 (Brandon Dep. Tr.) at 68:12-18.)	Disputed. Keating's cited evidence does not support this alleged statement of uncontroverted fact. Specifically, Glidewell disputes the characterization of these prescription instructions as "misspellings."	REDACTED REDACTED

	<p>REDACTED</p> <p>REDACTED Disputed based on evidentiary objections. See objections to Ex. 53 contained in Glidewell's Evidentiary Objections.</p>
<p>61. In each instance, the dentist confirmed that they wanted Keating's KDZ Bruxer all-zirconia crown. (Mangum Decl., Exs. 59- 62.)</p>	<p>Disputed. Keating did not always call dentists to confirm they wanted Keating's KDZ Bruxer all-zirconia crown. REDACTED</p> <p>REDACTED</p> <p>REDACTED</p> <p>Disputed based on evidentiary objections. See objections to Exs. 59-62 contained in Glidewell's Evidentiary Objections.</p>
<p>62. Thirteen of the dentists (identified in the list below) who submitted prescription forms with the aforementioned misspellings wrote "BruxZir," "bruxzir," or variations thereof, on their prescription forms as a</p>	<p>Disputed. This alleged statement of fact is inappropriately disguised as a conclusion of law. Practicing dentists located throughout the country have testified that the BruxZir mark signifies that Glidewell is the source of zirconia</p>

generic reference to an all-zirconia crown, not because they wanted a crown from Glidewell or were otherwise confused that Glidewell and Keating were affiliated:

- Dr. William Belton. (Belton Decl. ¶¶ 9-11 ; Ex. A.)
- Dr. Raymond Brady. (Brady Decl. ¶¶ 9-11 ; Ex. A.)
- Dr. Jonathan Campbell. (Campbell Decl. ¶¶ 10-12 ; Ex. A.)
- Dr. Michael Colleran. (Colleran Decl. ¶¶ 10-12 ; Ex. A.)
- Dr. Joseph Jacquinot. (Jacquinot Decl. ¶¶ 9-10 ; Ex. A.)
- Dr. Dennis Murphy. (Murphy Decl. ¶¶ 9-11 ; Ex. A.)
- Dr. Terry Myers. (Myers Decl. ¶¶ 9-10 ; Ex. B.)
- Dr. Thomas Nussear. (Nussear Decl. ¶¶ 9-11 ; Ex. A.)
- Dr. Stan Richardson. (Richardson Decl. ¶¶ 10-12; Ex. A.)
- Dr. Richard Scott. (Scott Decl. ¶¶ 9-11 ; Ex. A.)
- Dr. Scott Stephens. (Stephens Decl. ¶¶ 10-12 ; Ex. A.)

crowns and bridges marketed under that trademark. [Dkt. #90-1, Ex. A (Doneff Decl., ¶¶ 4-11), Ex. B (Newman Decl., ¶¶ 4-11), Ex. C (Cohen Decl., ¶¶ 4-11), Ex. D (Luke Decl., ¶¶ 4-11), Ex. E (Bell Decl., ¶¶ 4-11), Ex. F (Toca Decl., ¶¶ 4-11), and Ex. Q (Michiels Decl., ¶¶ 4-11).] Dr. DiTolla has testified that the BruxZir mark signifies that Glidewell is the source of zirconia crowns and bridges marketed under that trademark, and that the terms “BruxZir,” “bruxzir,” or variations thereon, are not used to refer to zirconia crowns and bridges as a type or category of product. [Dkt. #90-1, Ex. I (DiTolla Decl., ¶¶ 11-12, 17, 19).] Keating bears the burden of proof regarding validity of the BruxZir mark, so must proffer evidence to support this statement. *See Sengoku Work Ltd. v. RMC Intern., Ltd.*, 96 F.3d 1217, 1219–20 (9th Cir.1996). Disputed based on evidentiary objections FRE 401, 402, 403. See objections to Belton Decl., Brady Decl., Campbell Decl., Colleran Decl., Jacquinot Decl., Murphy Decl., Myers Decl., Nussear Decl., Richardson Decl., Scott Decl., Stephens Decl.,

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<ul style="list-style-type: none"> • Dr. Daniel Sweet. (Sweet Decl. ¶¶ 8-10 ; Ex. A.) • Dr. Gary Tobin. (Tobin Decl. ¶¶ 9-11 ; Ex. A.) 	<p>Sweet Decl., and Tobin Decl. contained in Glidewell’s Evidentiary Objections.</p>
<p>63. Keating is not the only dental laboratory which receives prescription forms from dentists with “BruxZir,” “bruxzir,” or variations thereon written as a generic reference to an all-zirconia crown: Showcase Dental Laboratory, a dental lab unaffiliated with Glidewell or Keating, has also received prescription forms from dentists who generically describe an all-zirconia crown as a “BruxZir,” “bruxzir,” or variation thereon. (Frattura Decl., ¶¶ 7-11, 18; Ex. A.)</p>	<p>Disputed. Keating bears the burden of proof regarding validity of the BruxZir mark, so must proffer evidence to support this statement. <i>See Sengoku Work Ltd. v. RMC Intern., Ltd.</i>, 96 F.3d 1217, 1219–20 (9th Cir.1996). Keating submits no evidence regarding the state of mind of the dentists submitting these prescription forms. Carole Frattura only speaks to her understanding as to the meaning of bruxer crowns, and does not purport to opine regarding the state of mind of the dentists submitting the prescription forms. [Dkt. #96 (Frattura Decl., ¶ 8).] It is far more likely that the dentists submitting these forms were confused as to whether Showcase offered Glidewell’s BruxZir dental crowns or whether there was some affiliation or association between Glidewell and Showcase, in light of the fact that Showcase offered zirconia dental crowns under the confusingly similar “Zir-Bruxer” mark prior to</p>

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	receiving a cease and desist letter from Glidewell's General Counsel in January 2012. [Dkt. #91-30.] Not disputed that Showcase Dental Laboratory received prescription orders for all-zirconia crowns which referenced "bruxzirr," "bruxer," and "bruxir" crowns. Disputed based on evidentiary objections. See objections to Frattura Decl., ¶ 18, Ex. A contained in Glidewell's Evidentiary Objections.
64. Glidewell itself uses the term BruxZir generically, as a noun and plural noun. (Van Hoosear Decl., Ex. V-4; (Compendium Clips) ("this Bruxzir is 100% zirconia" and "one question I get about Bruxzirs is . . ." and "We do 15,000, say, BruxZirs a week."); Van Hoosear Decl., Ex. V-1 (Shuck Dep. Video Clips); Van Hoosear Decl., Ex. V-2 (DiTolla Dep. Video Clips); Van Hoosear Decl., Ex. V-3 (Carden Dep. Video Clips); Jankowski Decl., Ex. 6 (Allred Dep. Tr.), at 195:22 – 196:1.)	Disputed. First, this alleged statement of fact is inappropriately disguised as a legal conclusion. Second, Keating's cited evidence does not support this alleged statement of fact. Specifically, in Dkt. #110 (Van Hoosear Decl., Exs. V-1-V-4) and Dkt. #91-6 (Jankowski Decl., Ex. 6 (Allred Dep. Tr.), at 195:22 – 196:1)), none of the witnesses testified that Glidewell's use of the word "BruxZir" was evidence of "generic use." REDACTED REDACTED

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REDACTED Dkt. #92-1 (Magnum Decl.,
Ex. 51, Carden Depo., at 191:8-12)
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Of those

dentists inquiring about the BruxZir
brand crown, approximately 1/3 of them
mispronounce the term
BruxZir. [Supplemental Declaration of
Dr. Michael DiTolla, Exhibit S to the
Appendix of Evidence, ¶ 2.] Instead of
referring to it as the phonetic equivalent
to “bruxer,” these dentists pronounce the
term “Brux-Zeer.” [*Id.*] In the DVDs
and videos, Dr. DiTolla is referring to
Glidewell’s BruxZir brand crown, not a
“bruxer” crown. [DiTolla Supp. Decl.,
Ex. S, ¶ 3.] Disputed based on
evidentiary objections. See objections
to Exs. 6, V-4 contained in Glidewell’s

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	Evidentiary Objections.
<u>E. Glidewell Has Produced No Evidence Of Actual Confusion As To Source Of Goods Or Affiliation Between Glidewell And Keating</u>	
65. Keating served Glidewell with an interrogatory asking Glidewell to identify any examples of actual confusion on the part of third parties regarding a relationship between Keating and Glidewell or Keating's KDZ Bruxer and Glidewell's BruxZir. (Jankowski Decl., Ex. 1 at 10.)	Not disputed.
66. Glidewell's interrogatory response alleged details for two such instances: <ul style="list-style-type: none"> In April 2011, a Glidewell employee named Nicole Fallon offered a \$20 coupon to Dr. Jade Le's dental office in Florida to try a BruxZir restoration. An employee in Dr. Le's office asked if she could apply the coupon to a previous purchase the office had made for Keating's KDZ Bruxer. (Jankowski Decl., Ex. 1 at 7-8, 10.) In May 2011, Dr. Thomas Nussear's dental office placed an 	Not disputed.

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<p>order with Keating for a KDZ Bruxer crown and wrote “BruxZir” on the prescription form. (<i>Id.</i>)</p>	
<p>67. Keating served Glidewell with a follow up interrogatory asking Glidewell to identify all facts relating to the alleged instance of confusion involving Dr. Jade Le’s dental office. (Jankowski Decl., Ex. 2 at 7.) In response, Glidewell further explained that Ms. Fallon made a telephone call to Dr. Le’s office and offered a discount on BruxZir crowns. (<i>Id.</i>)</p>	<p>Not disputed.</p>
<p>68. Glidewell employees, and dental professionals generally, pronounce “BruxZir” and “Bruxer” identically. (Eggleston Decl., Ex. 65 at 14- 16; Van Hoosear Decl., Exs. V-1 through V-4; Stephens Decl., ¶ 12; Scott Decl., ¶ 11; Colleran Decl., ¶ 12; Jacquinet Decl., ¶ 11; Nussear Decl., ¶ 11.)</p>	<p>Disputed. Keating's cited evidence does not support this alleged statement of uncontroverted fact. In Dkt. #110 (Van Hoosear Decl., Exs. V-1, V-2, V-3), Mr. Shuck, Dr. DiTolla, and Mr. Carden did not testify on behalf of “dental professionals generally.” In Dkt. #110 (Van Hoosear Decl., Ex. V1), Mr. Shuck does not pronounce “BruxZir” and “bruxer” “identically.” Specifically, Mr. Shuck, when pronouncing “BruxZir,” places an emphasis on the “Z” in “Zir.” By contrast, when pronouncing “bruxer,”</p>

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Mr. Shuck does not place any such emphasis as there is no “Z” in “bruxer.” In Dkt. #110 (Van Hoosear Decl., Ex. V2), Dr. DiTolla did not pronounce the term “bruxer.” Rather, in Dkt. #110 (Van Hoosear Decl., Ex. V2), Dr. DiTolla only pronounced the term “bruxers.” Thus, Dkt. #110 (Van Hoosear Decl., Ex. V2) does not show that Dr. DiTolla “pronounced BruxZir and bruxer identically.” REDACTED
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Dkt. #93-1 (Eggleston Decl., Ex. 65, at 12:5, 14:9-22), Dr. Eggleston did not opine on how “dental professionals generally” pronounce the terms

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	<p>“BruxZir” and “bruxer,” and does not provide evidence supporting same. In Dkt. #93-2 (Eggleston Decl., Ex. 66, at 3:10 – 4:5), Dr. Eggleston only opined on whether “dental professionals” use “the phrase “bruxer crown” as a generic term for an all zirconia crown,” <u>not</u> whether “dental professionals generally, pronounce “BruxZir” and “Bruxer” identically.” Similarly, in Dkt. #93-3 (Eggleston Decl., Ex. 67 at 1:26 – 2:3), Dr. Eggleston did <u>not</u> opine on the issue of whether “dental professionals generally, pronounce “BruxZir” and “Bruxer” identically.” Finally, the phrase “dental professionals” is vague and ambiguous. Disputed based on evidentiary objections. See objections to Stephens Decl., ¶ 12; Scott Decl., ¶ 11; Colleran Decl., ¶ 12; Jacquinet Decl., ¶ 11; Nussear Decl., ¶ 11, contained in Glidewell’s Evidentiary Objections.</p>
<p>69. In response to Keating’s follow up interrogatory, Glidewell pointed again to Dr. Nussear’s “Rx Order Form” (prescription form). (Jankowski Decl., Ex. 2 (Interrogatory No. 22); Jankowski</p>	<p>Not disputed.</p>

Decl., Ex. 1 (Interrogatory Nos. 7 & 8))

70. Dr. Nussear wrote “BruxZir” on his prescription form as a generic reference to an all-zirconia crown. (Nussear Decl., ¶¶ 9, 11.) Furthermore, Dr. Nussear neither intended to order a crown from Glidewell, nor was he confused as to any affiliation between Keating and Glidewell. (Nussear Decl., ¶ 10.)

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Disputed in part.
REDACTED

REDACTED REDACTED Disputed based on evidentiary objections FRE 401, 402, 403. See objections to Nussear Decl., ¶¶ 8-11, contained in Glidewell’s Evidentiary Objections

F. Glidewell’s Attempts To Prevent Others From Using “Bruxer” In Connection With All-Zirconia Crowns

71. On January 19, 2010, Glidewell received a federal registration in its trademark “BRUXZIR.” (Jankowski Decl., Ex. 6 (Allred Dep. Tr.) at 126:15; 137:1-4.)

Disputed based on evidentiary objections. See objections to Ex. 6 contained in Glidewell’s Evidentiary Objections.

72. Since that time, Glidewell has relied upon that registration as grounds for threatening trademark infringement suits against any other dental laboratory using “Brux” or “Bruxer” in a mark for an all-zirconia crown. (Jankowski, Ex. 6

Disputed. Glidewell has only enforced its BruxZir mark against companies offering solid zirconia dental restorations products where the trademarks are confusingly similar to the BruxZir mark. [Dkt. #90-1 (Allred

1 2 3 4 5 6	(Allred Dep. Tr.) at 213:19-264:13 & Exs. 24-34.)	Decl., Ex. L, ¶ 14); Allred Supp. Decl., Ex. U, ¶ 3.] Disputed based on evidentiary objections. See objections to Ex. 6 contained in Glidewell's Evidentiary Objections.
7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	<p>73. Specifically, Glidewell sent cease-and-desist letters to at least the following dental labs:</p> <ul style="list-style-type: none"> Assured Dental Lab — "Z-Brux" (Jankowski Decl., Ex. 28) Authentic Dental Lab — "Brux" (Jankowski Decl., Ex. 27) China Dental Outsourcing — "Bruxer All Zirconia" (Jankowski Decl., Ex. 29) Fusion Dental Lab — "Full Solid Bruxer Zirconia" (Jankowski Decl., Ex. 24) Old Dominion Milling Corp. — "Bruxzer" (Jankowski Decl., Ex. 32) Pittman Dental — "Bruxer All-Zirconia Crown" (Jankowski Decl., Ex. 25) R-dent Dental Laboratory — "R-Brux" (Jankowski Decl., Ex. 26) Showcase Dental Lab — "Zir- 	<p>Disputed based on evidentiary objections. See objections to Exs. 24-30, 32 contained in Glidewell's Evidentiary Objections.</p> <p>Glidewell also sent cease and desist letters to:</p> <ul style="list-style-type: none"> Advanced Dental Laboratories, "Bruxzir," Dentopia Dental Lab, "Full Zirconia (Bruxzir)," and Barth Dental Lab, "Z-Brux" and "Bruxzir." [Dkt #91-1(Allred Decl., Ex. L, ¶¶ 15, 16, 19; Dkt #90-21(Exs. 62, 63, 65).]; [Allred Supp. Decl., Ex. W, ¶ 4.]

1	Bruxer”) (Jankowski Decl., Ex.	
2	30)	
3	74. In each instance, the dental	Disputed based on evidentiary
4	laboratory chose to change its name	objections. See objections to Ex. 6
5	rather than face the risk of a lawsuit in	contained in Glidewell’s Evidentiary
6	Federal court versus Glidewell. (<i>Id.</i> ;	Objections.
7	Jankowski Decl., Ex. 6 (Allred Dep. Tr.)	
8	at 213:19-264:13.)	

GLIDEWELL’S STATEMENT OF ADDITIONAL MATERIAL

FACTS

Additional Material Facts	Supporting Evidence
75. Glidewell is a leading provider of dental restoration products to dentists.	Dkt. #90-1 (Declaration of Jim Shuck, Exhibit G to the Appendix of Evidence (“Shuck Decl.”), ¶ 4); Dkt. #90-1 (Declaration of Dr. Ronald Goldstein, Exhibit O to the Appendix of Evidence (“Goldstein Decl.”), ¶ 16).
76. Among the products that Glidewell sells are dental crowns and bridges.	Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 4).
77. A crown is a type of dental restoration product that completely caps a tooth.	Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 4).
78. A crown is typically bonded to the tooth using dental cement or resin.	Dkt. #90-1 (Shuck Decl., E. G, ¶ 4); Dkt. #90-1 (Declaration of Stuart R. Newman, Exhibit B to the Appendix of Evidence (“Newman Decl.”), ¶ 3); Dkt.

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	<p>#90-1 (Declaration of Terence J. Michiels, Exhibit Q to the Appendix of Evidence (“Michiels Decl.”), ¶ 3); Dkt. # 90-1 (Declaration of Spencer D. Luke, Exhibit D to the Appendix of Evidence (“Luke Decl.”), ¶ 3); Dkt. #90-1(Declaration of Gregory Doneff, Exhibit A to the Appendix of Evidence (“Doneff Decl.”), ¶ 3); Dkt. #90-1 (Declaration of Thomas E. Bell, Exhibit E to the Appendix of Evidence (“Bell Decl.”), ¶ 3); Dkt. #90-1 (Declaration of Howard S. Cohen, Exhibit C to the Appendix of Evidence (“Cohen Decl.”), ¶ 3); Dkt. #90-1 (Declaration of Kent J. Toca, Exhibit F to the Appendix of Evidence (“Toca Decl.”), ¶ 3).</p>
<p>79. In the past, crowns were principally fashioned either from gold (which has favorable tensile characteristics but is considered aesthetically unappealing by many people) or from porcelain veneers fused to a metal casting (which is aesthetically appealing but tends to crack when subjected to heavy pressure or grinding).</p>	<p>Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 5).</p>

1	80. More recently, dental laboratories	Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 5).
2	began to fashion crowns made of a	
3	veneer fused or adhered to a hard	
4	ceramic such as zirconia.	
5	81. However, these crowns too tended	Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 5).
6	to crack when subjected to heavy	
7	grinding.	
8	82. Beginning in 2005, Glidewell	Dkt. #90-1 (Declaration of Robin
9	began developing a new type of crown,	Carden, Exhibit J to the Appendix of
10	a solid zirconia crown.	Evidence, ¶ 2).
11	83. The advantages of this new	Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 9),
12	monolithic zirconia (or “full contour	Dkt. #90-1 (Declaration of Michael C.
13	zirconia”) crown were that it would be	DiTolla, Exhibit I to the Appendix of
14	extremely hard – sufficiently hard to be	Evidence (“DiTolla Decl.”), ¶ 18);
15	used in applications requiring a	Dkt. #90-1 (Newman Decl., Ex. B, ¶
16	material with high tensile and	11); Dkt. #90-1 (Michiels Decl., Ex. Q,
17	compressive strength, including	¶ 11); Dkt. #90-1 (Luke Decl., Ex. D, ¶
18	treating patients with “bruxism,” a	11); Dkt. #90-1 (Doneff Decl., Ex. A, ¶
19	parafunctional activity in which a	11); Dkt. #90-1 (Bell Decl., Ex. E, ¶
20	person repeatedly and habitually grinds	11); Dkt. #90-1 (Cohen Decl., Ex. C, ¶
21	his teeth – and that it could be milled	11); Dkt. #90-1 (Toca Decl., Ex. F, ¶
22	from a block of zirconia based on a	11).
23	digital representation of the patient’s	
24	mouth. Glidewell’s crowns are not	
25	used only by people who suffer from	
26	bruxism; they are used by a variety of	
27	patients who choose to have monolithic	
28	zirconia crowns due to tooth damage	

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caused by a variety of conditions.	
84. The disadvantage was that zirconia is an unattractive material, due to its extreme whiteness and lack of translucency.	Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 10), Dkt. #90-1 (DiTolla Decl., Ex. I, ¶ 18).
85. Ultimately, Glidewell partially overcame the aesthetic challenges of the material, devising a process for fabricating a full contour zirconia crown that was sufficiently appealing that it could be used in a variety of applications.	Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 10), Dkt. #90-1 (DiTolla Decl., Ex. I, ¶ 18).
86. In early 2009, Glidewell conceived the name for its new line of monolithic zirconia dental restoration products: BruxZir.	Dkt. #90-1 (Shuck Decl., Ex. G, ¶¶ 8, 9).
87. The name was chosen in large part because it suggested the primary characteristics of the product: that it was sufficiently strong and durable to be used in a variety of applications, including treating patients with bruxism ("Brux"), and that the material from which the crown was fashioned is zirconia ("Zir").	Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 9); Dkt. #90-1 (Goldstein Decl., Ex. O, ¶ 17); Dkt. #90-1 (Declaration of David Franklyn, Exhibit N to the Appendix of Evidence ("Franklyn Decl."), ¶ 42); Dkt. #90-1 (Declaration of Rudy Ramirez, Exhibit H to the Appendix of Evidence ("Ramirez Decl."), ¶ 4.);
88. Glidewell's line of monolithic zirconia dental restoration products, including full contour zirconia crowns,	Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 7).

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was launched under the BruxZir mark in June 2009.	
89. Glidewell has been marketing monolithic zirconia dental restoration products, including full contour zirconia crowns, under the BruxZir mark continuously since June 2009.	Dkt. #90-1 (Shuck Decl., Ex. G, ¶¶ 38, 39).
90. Since its introduction in 2009, the BruxZir line of restoration products (primarily dental crowns and bridges) has been phenomenally popular, generating nearly REDACTED in revenue from July 2009 through September 2012.	Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 41).
91. Glidewell has promoted the BruxZir product line heavily, investing nearly REDACTED in advertising its products under the mark from June 2009 to June 2012.	Dkt. #90-1 (Shuck Decl., Ex. G, ¶¶ 38, 39); Dkt. #90-1 (Goldstein Decl., Ex. O, ¶ 16).
92. Glidewell applied to register the BruxZir mark on June 7, 2009 for use in connection with dental bridges, dental caps, dental crowns, dental inlays, dental onlays, and dental prostheses.	Dkt. #90-1 (Declaration of Keith Allred, Exhibit L to the Appendix of Evidence ("Allred Decl."), ¶ 5), Dkt. #90-19 (Exs. 59-60).
93. Glidewell's BruxZir mark was registered on the Principal Register for	Dkt. #90-1 (Allred Decl., Ex. L, ¶ 5), Dkt. #90-19 (Exs. 59-60).

1	use in connection with dental bridges,	
2	dental caps, dental crowns, dental	
3	inlays, dental onlays, and dental	
4	prostheses on January 19, 2010, as Reg.	
5	No. 3,739,663.	
6	94. Glidewell owns U.S. Trademark	Dkt. #90-1 (Allred Decl., Ex. L, ¶ 5),
7	Reg. No. 3,739,663.	Dkt. #90-1 (Exs. 59-60).
8	95. In May 2011, Keating Dental Arts,	Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 15).
9	Inc. ("Keating") began to offer full	
10	contour zirconia dental crowns and	
11	bridges under the brand "KDZ Bruxer."	
12	96. The BruxZir mark suggests, but	Dkt. #90-1 (Franklyn Decl., Ex. N, ¶
13	does not directly describe, a particular	42).
14	quality or characteristic of the dental	
15	restoration products that Glidewell	
16	offers under the mark.	
17	97. The BruxZir mark suggests that	Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 9);
18	crowns marketed under the brand are	Dkt. #90-1 (Goldstein Decl., Ex. O, ¶
19	strong because they are appropriate for	26).
20	patients who "brux," i.e., who grind	
21	their teeth, and also suggests that the	
22	crowns are made from zirconia, a	
23	particularly hard material.	
24	98. Glidewell's crowns are not used	Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 9),
25	only by people who suffer from	Dkt. #90-1 (DiTolla Decl., Ex. I, ¶ 14).
26	bruxism; they are used by a variety of	
27	patients who choose to have monolithic	
28	zirconia crowns due to tooth damage	

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caused by a variety of conditions.	
99. Glidewell markets crowns and bridges under the BruxZir mark to dentists in the United States.	Dkt. #90-1 (Shuck Decl., Ex. G, ¶¶ 20-26); Dkt. #90-1 (Newman Decl., Ex. B, ¶ 3); Dkt. #90-1 (Michiels Decl., Ex. Q, ¶ 3); Dkt. #90-1 (Luke Decl., Ex. D, ¶ 3); Dkt. #90-1 (Doneff Decl., Ex. A, ¶ 3); Dkt. #90-1 (Bell Decl., Ex. E, ¶ 3); Dkt. #90-1 (Cohen Decl., Ex. C, ¶ 3); Dkt. #90-1 (Toca Decl., Ex. F, ¶ 3).
100. Glidewell promotes its dental crowns and bridges under the BruxZir mark through the Internet (through Glidewell's blog as well as www.BruxZir.com), direct mailers, trade shows, ads in dental industry publications, press releases, continuing education brochures, videos and training sessions for dentists, samples, and specialized prescription forms.	Dkt. #90-1 (Shuck Decl., Ex. G, ¶¶ 20-26); Dkt. #90-1 (Newman Decl., Ex. B, ¶ 3); Dkt. #90-1 (Michiels Decl., Ex. Q, ¶ 3); Dkt. #90-1 (Luke Decl., Ex. D, ¶ 3); Dkt. #90-1 (Doneff Decl., Ex. A, ¶ 3); Dkt. #90-1 (Bell Decl., Ex. E, ¶ 3); Dkt. #90-1 (Cohen Decl., Ex. C, ¶ 3); Dkt. #90-1 (Toca Decl., Ex. F, ¶ 3); Dkt. #90-1 (Goldstein Decl., Ex. O, ¶ 19), Dkt. #90-1 (DiTolla Decl., Ex. I, ¶¶ 4, 6-7, 10).
101. Over the period June 2009 to June 2012, Glidewell spent approximately REDACTED in promoting its BruxZir finished crowns and bridges through these channels.	Dkt. #90-1 (Shuck Decl., Ex. G, ¶¶ 38, 39); Dkt. #90-1 (Goldstein Decl., Ex. O, ¶ 16); [Shuck Supp. Decl., Ex. R, ¶ 10.]
102. Over the period June 2009 to June 2012, Glidewell spent approximately REDACTED marketing Glidewell's	Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 39).

1	BruxZir finished crowns and bridges,	
2	and about REDACTED was spent	
3	marketing Glidewell's BruxZir zirconia	
4	milling blanks.	
5	103. Over the period June 2009 to June	Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 38).
6	2012, Glidewell spent approximately	
7	REDACTED on direct mail advertising	
8	for BruxZir finished crowns and	
9	bridges, which was sent to roughly	
10	every dentist in the country, and	
11	another roughly REDACTED on	
12	advertising in dental industry	
13	publications, with the remainder being	
14	allocated among Glidewell's other	
15	marketing channels.	
16	104. Glidewell's advertising of crowns	Dkt. #90-1 (Shuck Decl., Ex. G, ¶¶ 11-
17	and bridges under the BruxZir mark has	12, 21); Dkt. #90-1 (Goldstein Decl.,
18	accomplished substantial market	Ex. O, ¶¶ 16, 19); Dkt. #90-1 (Newman
19	penetration.	Decl., Ex. B, ¶ 3-6); Dkt. #90-1
20		(Michiels Decl., Ex. Q, ¶ 3-6); Dkt.
21		#90-1 (Luke Decl., Ex. D, ¶ 3-6); Dkt.
22		#90-1 (Doneff Decl., Ex. A, ¶ 3-6);
23		Dkt. #90-1 (Bell Decl., Ex. E, ¶ 3-6);
24		Dkt. #90-1 (Cohen Decl., Ex. C, ¶ 3-6);
25		Dkt. #90-1 (Toca Decl., Ex. F, ¶ 3-6).
26	105. For example, between October	Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 21);
27	2009 and November 2012, the	Dkt. #90-1 (Goldstein Decl., Ex. O, ¶
28	<u>www.BruxZir.com</u> website received	16).

1	approximately 289,210 unique	
2	pageviews, of which 78% constituted	
3	U.S. traffic.	
4	106. There are approximately 125,000	Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 21);
5	dentists in the United States.	Dkt. #90-1 (Goldstein Decl., Ex. O, ¶
6		16).
7	107. Glidewell's direct mail	Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 24).
8	advertising of crowns and bridges	
9	under the BruxZir mark is sent every	
10	quarter to nearly the entire population	
11	of dentists in the country.	
12	108. Glidewell's promotion of the	Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 22);
13	BruxZir line of crowns and bridges in	Dkt. #90-1 (Goldstein Decl., Ex. O, ¶
14	dental industry publications is	19); Dkt. #90-1 (Newman Decl., Ex. B,
15	consistent, ongoing and pervasive.	¶ 3); Dkt. #90-1 (Michiels Decl., Ex.
16		Q, ¶ 3); Dkt. #90-1 (Luke Decl., Ex. D,
17		¶ 3); Dkt. #90-1 (Doneff Decl., Ex. A,
18		¶ 3); Dkt. #90-1 (Bell Decl., Ex. E, ¶
19		3); Dkt. #90-1 (Cohen Decl., Ex. C, ¶
20		3); Dkt. #90-1 (Toca Decl., Ex. F, ¶ 3).
21	109. Advertisements promoting	Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 22);
22	Glidewell's BruxZir crowns and	Dkt. #90-1 (Newman Decl., Ex. B, ¶
23	bridges run in numerous publications,	3); Dkt. #90-1 (Michiels Decl., Ex. Q,
24	including ADA News (once a month),	¶ 3); Dkt. #90-1 (Luke Decl., Ex. D, ¶
25	Chairside Magazine, Dental	3); Dkt. #90-1 (Doneff Decl., Ex. A, ¶
26	Economics, Dental Lab Reports,	3); Dkt. #90-1 (Bell Decl., Ex. E, ¶ 3);
27	Dentaltown, Dental Tribune, Dentistry	Dkt. #90-1 (Cohen Decl., Ex. C, ¶ 3);
28	Today, Inclusive Magazine, JDT, and	Dkt. #90-1 (Toca Decl., Ex. F, ¶ 3);

1	LMT.	Dkt. #90-1 (Goldstein Decl., Ex. O, ¶
2		19); Dkt. #90-1 (DiTolla Decl., Ex. I,
3		¶¶ 6-7).
4	110. Glidewell selects ADA News,	Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 22).
5	Chairside Magazine, Dental	
6	Economics, Dental Lab Reports,	
7	Dentaltown, Dental Tribune, Dentistry	
8	Today, Inclusive Magazine, JDT, and	
9	LMT because of their wide readership	
10	and ability to reach thousands, if not	
11	hundreds of thousands, of dentists and	
12	dental laboratories.	
13	111. Glidewell attends dozens of trade	Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 26);
14	shows and conventions a year around	Dkt. #90-1 (Michiels Decl., Ex. Q, ¶
15	the country, especially the American	3); Dkt. #90-1 (Luke Decl., Ex. D, ¶ 3);
16	Dental Association conventions.	Dkt. #90-1 (Doneff Decl., Ex. A, ¶ 3).
17	112. At these conventions and trade	Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 26);
18	shows, Glidewell consistently,	Dkt. #90-1 (Michiels Decl., Ex. Q, ¶
19	prominently displays the BruxZir mark	3); Dkt. #90-1 (Luke Decl., Ex. D, ¶ 3);
20	in connection with its line of dental	Dkt. #90-1 (Doneff Decl., Ex. A, ¶ 3).
21	crowns and bridges in a variety of	
22	contexts, including on the booth, the	
23	signage, in brochures, and takeaways.	
24	113. Dr. Michael DiTolla, Glidewell's	Dkt. #90-1 (Shuck Decl., Ex. G, ¶¶ 27-
25	Director of Clinical Education and	29); Dkt. #90-1 (Luke Decl., Ex. D, ¶
26	Research, and Robin Carden,	3); Dkt. #90-1 (DiTolla Decl., Ex. I, ¶¶
27	Glidewell's Vice President of Research	4, 6-7, 10).
28	and Development, make educational	

1	videos, write articles and give	
2	presentations concerning Glidewell's	
3	BruxZir-branded products.	
4	114. Dr. DiTolla's presentations and	Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 27).
5	videos are viewed by thousands of	
6	dentists every year.	
7	115. Glidewell's BruxZir branded line	Dkt. #90-1 (Shuck Decl., Ex. G, ¶¶ 30-
8	of dental restoration products has	36); Dkt. #90-1 (Goldstein Decl., Ex.
9	received wide recognition and acclaim	O, at ¶ 20); Dkt. #90-1 (Newman Decl.,
10	in the dental industry.	Ex. B, ¶ 3-6); Dkt. #90-1 (Michiels
11		Decl., Ex. Q, ¶ 3-6); Dkt. #90-1 (Luke
12		Decl., Ex. D, ¶ 3-6); Dkt. #90-1
13		(Doneff Decl., Ex. A, ¶ 3-6); Dkt. #90-
14		1 (Bell Decl., Ex. E, ¶ 3-6); Dkt. #90-1
15		(Cohen Decl., Ex. C, ¶ 3-6); Dkt. #90-1
16		(Toca Decl., Ex. F, ¶ 3-6).
17	116. Numerous articles have been	Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 30).
18	written by third parties concerning the	
19	BruxZir dental restoration products and	
20	referencing them by Glidewell's	
21	registered mark.	
22	117. Glidewell has received numerous	Dkt. #90-1 (Shuck Decl., Ex. G, ¶¶ 32-
23	awards recognizing the superiority of	36); Dkt. #90-1 (Goldstein Decl., Ex.
24	its BruxZir-brand dental crowns and	O, ¶ 20).
25	bridges, including (1) the 2010 Best	
26	Product Innovation Award from Tosch	
27	Corporation, (2) the Journal of Dental	
28	Technology's Wow! 2011 Products	

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<p>Awards, (3) Inside Dental Technology 2011 iNavigator Top Pick, (4) 2011 Best Product from Clinician's Report, (4) the Pride Institute's 2012 Best of Class Technology Award, and (5) 2012 semifinal candidate for Best New Material.</p>	
<p>118. BruxZir is the number one prescribed brand of full zirconia dental crown in the country.</p>	<p>Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 12).</p>
<p>119. From June 2009 to September 2012, Glidewell has sold approximately REDACTED and bridges under the mark.</p>	<p>Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 41).</p>
<p>120. In monetary terms, from July 2009 to September 2012 Glidewell sold REDACTED nearly worth of dental crowns and bridges under the BruxZir mark.</p>	<p>Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 41).</p>
<p>121. The BruxZir mark has achieved wide recognition among dentists in the U.S. for dental crowns and bridges.</p>	<p>Dkt. #90-1 (Shuck Decl., Ex. G, ¶¶ 11, 30-36); Dkt. #90-1 (Newman Decl., Ex. B, ¶¶ 4-6, 9-10); Dkt. #90-1 (Michiels Decl., Ex. Q, ¶¶ 4-6, 9-10); Dkt. #90-1 (Luke Decl., Ex. D, ¶¶ 4-6, 9-10); Dkt. #90-1 (Doneff Decl., Ex. A, ¶¶ 4-6, 9-10); Dkt. #90-1 (Bell Decl., Ex. E, ¶¶ 4-6, 9-10); Dkt. #90-1 (Cohen Decl., Ex. C, ¶¶ 4-6, 8-10); Dkt. #90-1</p>

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	(Toca Decl., Ex. F, ¶¶ 4-6, 9-10).
122. In 2010, Dentsply, the second largest dental company in the United States and a manufacturer of ceramic products, conducted research to identify brands for fixed products (such as crowns and bridges) that have a high degree of recognition among dentists and dental laboratories in the U.S.	Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 11).
123. The results of Dentsply's research indicated that Glidewell's BruxZir mark had a high degree of recognition among dentists and dental laboratories in the U.S.	Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 11).
124. There are only five marks used in commerce in the U.S. that sound anything like BruxZir for use in connection with either dental crowns or with constitutive materials: (1) Glidewell's registered BruxZir mark; (2) Glidewell's unregistered BruxZir mark; (3) Keating's KDZ Bruxer mark; (4) "GPS BruxArt" (a competitor's junior pending mark); and (5) "BruxThetix" (another competitor's junior pending mark).	Dkt. #90-1 (Franklyn Decl., Ex. N, ¶ 46).
125. The BruxZir mark is relatively unique in its field in the U.S.	Dkt. #90-1 (Franklyn Decl., Ex. N, ¶ 46).

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126. The BruxZir mark is commercially strong with respect to dental crowns and bridges in the U.S.

Dkt. #90-1 (Franklyn Decl., Ex. N, ¶ 46); Dkt. #90-1 (Newman Decl., Ex. B, ¶¶ 3-6, 9-10); Dkt. #90-1 (Michiels Decl., Ex. Q, ¶¶ 3-6, 9-10); Dkt. #90-1 (Luke Decl., Ex. D, ¶¶ 3-6, 9-10); Dkt. #90-1 (Doneff Decl., Ex. A, ¶¶ 3-6, 9-10); Dkt. #90-1 (Bell Decl., Ex. E, ¶¶ 3-6, 9-10); Dkt. #90-1 (Cohen Decl., Ex. C, ¶¶ 3-6, 8-10); Dkt. #90-1 (Toca Decl., Ex. F, ¶¶ 3-6, 9-10); Dkt. #90-1 (Goldstein Decl., Ex. O, ¶¶ 15-16, 21).

127. Keating's dental crowns and bridges marketed under the KDZ Bruxer brand compete directly with Glidewell's dental crowns and bridges marketed under the BruxZir mark.

Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 15); Dkt. #90-1 (Luke Decl., Ex. D, ¶ 12); Dkt. #90-1 (Bell Decl., Ex., E, ¶ 12); Dkt. #90-1 (Goldstein Decl., Ex. O, ¶ 25).

128. Both Glidewell and Keating sell full contour zirconia crowns and bridges under their respective BruxZir and KDZ Bruxer marks.

[Dkt. #90-1 (Declaration of William Wong, Exhibit P to the Appendix of Evidence ("Wong Decl."), ¶ 9), Dkt. #90-30 (Ex. 81, (no. 6))]; [Dkt. #90-1 (Wong Decl., Ex. P, ¶ 15), Dkt. #90-30 (Ex. 87, (no. 2))]; [Dkt. #90-1 (Newman Decl., Ex. B, ¶¶ 4-6, 9-10)]; [Dkt. #90-1 (Michiels Decl., Ex. Q, ¶¶ 4-6, 9-10)]; [Dkt. #90-1 (Luke Decl., Ex. D, ¶¶ 4-6, 9-10, 12)]; [Dkt. #90-1 (Doneff Decl., Ex. A, ¶¶ 4-6, 9-10)]; [Dkt. #90-1 (Bell Decl., Ex. E, ¶¶ 4-6, 9-10, 12)];

1		Dkt. #90-1 (Cohen Decl., Ex. C, ¶¶ 4-6,
2		8-10)]; [Dkt. #90-1 (Toca Decl., Ex. F,
3		¶¶ 4-6, 9-10)].
4	129. Both Glidewell and Keating sell	[Dkt. #90-1 (Wong Decl., Ex. P, ¶ 13),
5	dental crowns and bridges under their	Dkt. #90-30 (Exhibit 85, (104:24-
6	respective BruxZir and KDZ Bruxer	105:3))]; [Dkt. #90-1 (Luke Decl., Ex.
7	marks throughout the United States.	D, ¶ 12)]; [Dkt. #90-1 (Bell Decl., Ex.
8		E, ¶ 12)].
9	130. Both Glidewell and Keating sell	[Dkt. #90-1 (Shuck Decl., Ex. G, ¶
10	full contour zirconia crowns and	15)].
11	bridges under their respective BruxZir	
12	and KDZ Bruxer marks.	
13	131. Both Keating and Glidewell sell	[Dkt. #90-1 (Shuck Decl., Ex. G, ¶
14	full contour zirconia crowns and	15)].
15	bridges to the same universe of	
16	potential buyers – dentists throughout	
17	the U.S.	
18	132. Glidewell's BruxZir crowns are	[Dkt. #90-1 (Shuck Decl., Ex. G, ¶
19	sold at a comparable price point to	16)].
20	Glidewell's KDA Bruxer crowns.	
21	133. Glidewell's BruxZir crowns are	[Dkt. #90-1 (Shuck Decl., Ex. G, ¶
22	sold for \$99 per crown, excluding	16)].
23	rebates, promotions and other special	
24	pricing.	
25	134. Keating's KDA Bruxer crowns	[Dkt. #90-1 (Wong Decl., Ex. P, ¶ 14),
26	are sold for \$139 per crown, excluding	Dkt. #90-30 (Ex. 86, (43:17-20))];
27	rebates, promotions and other special	[Dkt. #90-1 (DiTolla Decl., Ex. I, ¶
28	pricing.	15), Dkt. #90-24 (Ex. 76.)]

135. Dentists in the U.S. consider Glidewell's BruxZir crowns and Keating's KDZ Bruxer crowns to be directly competitive.	[Dkt. #90-1 (Bell Decl., Ex. E, ¶ 12)]; [Dkt. #90-1 (Luke Decl., Ex. D, ¶ 12)].
136. Of the 22 dentists that Keating identified as Keating customers who had purchased a KDZ Bruxer crown in Keating's Third Amended Disclosures, nine – i.e., 41% – had previously purchased one or more BruxZir crowns from Glidewell.	[Dkt. #90-1 (Declaration of Rudy Ramirez , Exhibit H to the Appendix of Evidence ("Ramirez Decl."), ¶ 6.)]; [Dkt. #90-1 (Wong Decl., Ex. P, ¶ 16), Dkt. #90-30 (Ex. 88)].
137. Glidewell's BruxZir mark does not include two or more separable word elements or a design or logo.	[Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 19), Dkt. #90-3 (Ex. 8)].
138. Keating capitalizes the first letter of the "Bruxer" component of its mark, just as Glidewell capitalizes the first letter of "BruxZir."	[Dkt. #90-1 (DiTolla Decl., Ex. I, ¶ 15), Dkt. #90-24 (Ex. 76)].
139. Keating's KDZ Bruxer mark prefaces a root word ("Bruxer") that is nearly identical to the entirety of Glidewell's mark ("BruxZir") with a three-letter acronym ("KDZ") that does not on its face serve any source-identifying function.	[Dkt. #90-1 (Shuck Decl. Ex. G, ¶ 19), Dkt. #90-3 (Ex. 8)]; [Dkt. #90-1 (DiTolla Decl., Ex. I, ¶¶ 15, 19), Dkt. #90-2 (Exs. 3-4), Dkt. #90-24 (Ex. 76)].
140. In the text of Keating's advertisements the term KDZ is no more prominent than the "Bruxer"	[Dkt. #90-1 (DiTolla Decl., Ex. I, ¶ 15), Dkt. #90-24 (Ex. 76)].

1	component of its mark.	
2	141. Dentists are not likely to consider	[Dkt. #90-1 (Shuck Decl., Ex. G, ¶
3	the BruxZir and KDZ Bruxer marks	18)]; [Dkt. #90-1 (DiTolla, Ex. I, ¶
4	side by side as a shopper would two	20)].
5	competing brands in a supermarket;	
6	instead, they are likely to consider the	
7	marks separately at different points in	
8	time.	
9	142. Subtle differences in the BruxZir	[Dkt. #90-1 (Goldstein Decl., Ex. O, ¶
10	and KDZ Bruxer marks are less likely	26)].
11	to be “in the buyer’s mind” when the	
12	buyer makes the decision to purchase	
13	Keating’s dental crowns under the	
14	KDZ Bruxer mark than if products	
15	marketed under the two marks were	
16	offered side by side.	
17	143. The BruxZir mark and the KDZ	[Dkt. #90-1 (Wong Decl., Ex. P, ¶ 13),
18	Bruxer mark suggest similar meanings.	Dkt. #90-30 (Ex. 85, (43:15-44:8, 83:9-
19		15))]; [Dkt. #90-1 (Shuck Decl., Ex. G,
20		¶ 9)]; [Dkt. #90-1 (Goldstein Decl., Ex.
21		O, ¶ 26)]; [Dkt. #90-1 (DiTolla, Ex. I, ¶
22		14)]; [Dkt. #90-1 (Franklyn Decl., Ex.
23		N, ¶ 49)].
24	144. BruxZir suggests a product	[Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 9)];
25	indicated for people who suffer from	[Dkt. #90-1 (Goldstein Decl., Ex. O, ¶
26	bruxism, i.e., people who tend to grind	26)]; [Dkt. #90-1 (DiTolla, Ex. I, ¶
27	their teeth (“Brux”) and that the	14)]; [Dkt. #90-1 (Wong Decl., Ex. P, ¶
28	product is made of zirconia (“Zir”).	13), Dkt. #90-30 (Ex. 85, (43:15-44:8,

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	83:9-15)))].
145. KDZ Bruxer suggests a product indicated for people who suffer from bruxism (“Bruxer”) and that the product is made of zirconia (the “Z” in KDZ).	[Dkt. #90-1 (Franklyn Decl., Ex. N, ¶ 49)]; [Dkt. #90-1 (Wong Decl., Ex. P, ¶ 13), Dkt. #90-30 (Ex. 85, (43:15-44:8, 83:9-15)))].
146. REDACTED REDACTED	[Dkt. #90-1 (Declaration of Nicole Fallon, Exhibit M to the Appendix of Evidence, ¶¶ 4-10), Dkt. #90-2 (Ex. 2)]; [Dkt. #90-1 (Goldstein Decl., Ex. O, ¶ 23)].

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REDACTED	[Dkt. #90-1 (Wong Decl., Ex. P, ¶ 12), Dkt. #90-30 (Ex. 84, (56:23-57:6))]; [Dkt. #90-1 (Wong Decl., Ex. P, ¶ 4), Dkt. #90-4 (Ex. 15)].
REDACTED	[Dkt. #90-1 (Wong Decl., Ex. P, ¶ 12), Dkt. #90-30 (Ex. 84, (58:11-14, 68:12- 18))]; [Dkt. #90-1 (Wong Decl., Ex. P, ¶ 4), Dkt. #90-4 (Ex. 15)].
REDACTED	[Dkt. #90-1 (Wong Decl., Ex. P, ¶ 4), Dkt. #90-4 (Ex. 15. (KDA3355, 3358))]; [Dkt. #90-1 (Goldstein Decl., Ex. O, ¶ 28)].
REDACTED	[Dkt. #90-1 (Wong Decl., Ex. P, ¶ 4), Dkt. #90-4 (Ex. 15, (KDA3350, 3352))].

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[Dkt. #90-1 (Wong Decl., Ex. P, ¶ 4),
Dkt. #90-4 (Ex. 15, (KDA3359,
3362))].

REDACTED

[Dkt. #90-1 (Wong Decl., Ex. P, ¶ 4),
Dkt. #90-4 (Ex. 15, (KDA3363,
3366))].

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[Dkt. #90-1 (Wong Decl., Ex. P, ¶ 4),
Dkt. #90-4 (Ex. 15, (KDA3367,
3370))].

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REDACTED	[Dkt. #90-1 (Wong Decl., Ex. P, ¶ 4), Dkt. #90-4 (Ex. 15, (KDA3371- 3373))].
REDACTED	[Dkt. #90-1 (Wong Decl., Ex. P, ¶ 4), Dkt. #90-4 (Ex. 15, (KDA3375- 3377))].
REDACTED	[Dkt. #90-1 (Wong Decl., Ex. P, ¶ 4), Dkt. #90-4 (Ex. 15, (KDA3384, 3386))].
REDACTED	[Dkt. #90-1 (Wong Decl., Ex. P, ¶ 4), Dkt. #90-4 (Ex. 15, (KDA3392, 3394))].
REDACTED	[Dkt. #90-1 (Wong Decl., Ex. P, ¶ 4),

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Dkt. #90-4 (Ex. 15, (KDA3404, 3406))].

REDACTED

[Dkt. #90-1 (Wong Decl., Ex. P, ¶ 4), Dkt. #90-4 (Ex. 15, (KDA3444, 3446))].

REDACTED

[Dkt. #90-1 (Wong Decl., Ex. P, ¶ 4), Dkt. #90-4 (Ex. 15, (KDA 3486-3488))].

REDACTED

[Dkt. #90-1 (Wong Decl., Ex. P, ¶ 4), Dkt. #90-4 (Ex. 15)].

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REDACTED	[Dkt. #92-1 (Mangum Decl., Exhibit 57)].
163. The channels through which Glidewell's BruxZir dental crowns and bridges are marketed are nearly identical to those through which Keating's KDZ Bruxer-brand dental crowns and bridges are marketed.	[Dkt. #90-1 (Newman Decl., Ex. B, ¶ 3)]; [Dkt. #90-1 (Michiels Decl., Ex. Q, ¶ 3)]; [Dkt. #90-1 (Luke Decl., Ex. D, ¶ 3)]; [Dkt. #90-1 (Doneff Decl., Ex. A, ¶ 3)]; [Dkt. #90-1 (Bell Decl., Ex. E, ¶ 3)]; [Dkt. #90-1 (Cohen Decl., Ex. C, ¶ 3)]; [Dkt. #90-1 (Toca Decl., Ex. F, at 3)]; [Dkt. #90-1 (Goldstein Decl., Ex. O, ¶¶ 27-28)]; [Dkt. #90-1 (Wong Decl., Ex. P, ¶ 13), Dkt. #90-30 (Ex. 85, (105:4-25))].
164. Keating markets its dental crowns and bridges under its KDZ Bruxer mark through the Internet (on Keating's website and Shaun Keating's blog, direct mailers, trade shows, ads in dental industry publications, continuing education seminars held at Keating's	[Dkt. #90-1 (Wong Decl., Ex. P, ¶ 9), Dkt. #90-30 (Ex 81, (no. 21))]; [Dkt. #90-1 (Wong Decl., Ex. P, ¶ 12), Dkt. #90-30 (Ex. 84, (26:11-20 & 70:23-71:17; Exh. 514; 90:15-25; Exh. 519; 93:19-94:5 and Exh. 520))]; [Dkt. #90-1 (Wong Decl., Ex. P, ¶ 13), Dkt. #90-

1	laboratory, Keating invoices, and	30 (Ex. 85, (92:14-93:12; 104:24-
2	specialized prescription forms.	106:10))).
3	165. Glidewell and Keating promote	[Dkt. #90-1 (Wong Decl., Ex. P, ¶ 10),
4	their respective BruxZir and KDZ	Dkt. #90-30 (Ex. 82, (no. 10))]; [Dkt.
5	Bruxer products in some of the same	#90-1 (Newman Decl., Ex. B, ¶ 3)];
6	magazines – such as ADA News,	[Dkt. #90-1 (Michiels Decl., Ex. Q, ¶
7	Dental Economics, Dentistry Today,	3)]; [Dkt. #90-1 (Luke Decl., Ex. D, ¶
8	and Dentaltown.	3)]; [Dkt. #90-1 (Doneff Decl., Ex. A,
9		¶ 3)]; [Dkt. #90-1 (Bell Decl., Ex. E, ¶
10		3)]; [Dkt. #90-1 (Cohen Decl., Ex. C, ¶
11		3)]; [Dkt. #90-1 (Toca Decl., Ex. F, ¶
12		3)].
13	166. Glidewell’s BruxZir brand	[Dkt. #90-1 (DiTolla Decl., Ex. I, ¶
14	crowns, Keating’s KDZ Bruxer crowns,	21)].
15	and other competitors’ full contour	
16	zirconia crowns have similar features	
17	and are generally indicated for the same	
18	uses. Many dentists may regard them	
19	as interchangeable.	
20	167. While there are aesthetic	[Dkt. #90-1 (Franklyn Decl., Ex. N, ¶
21	differences between different brands of	49)].
22	full contour zirconia crown, the	
23	properties of these crowns are highly	
24	similar because all of these crowns are	
25	made of the same material – zirconia.	
26	168. Keating selected its KDZ Bruxer	[Dkt. #90-1 (Wong Decl., Ex. P, ¶ 12),
27	mark in the winter or spring of 2011.	Dkt. #90-30 (Ex. 84, (92:15-93:3))].
28	169. By the spring of 2011,	[Dkt. #90-1 (Newman Decl., Ex. B, ¶¶

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Glidewell's BruxZir mark was already well known in the industry.	3-6, 9-10)]; [Dkt. #90-1 (Michiels Decl., Ex. Q, ¶¶ 3-6, 9-10)]; [Dkt. #90-1 (Doneff Decl., Ex. A, ¶¶ 3-6, 9-10)]; [Dkt. #90-1 (Bell Decl., Ex. E, ¶¶ 3-6, 9-10)]; [Dkt. #90-1 (Cohen Decl., Ex. C, ¶¶ 3-6, 8-10)]; [Dkt. #90-1 (Toca Decl., Ex. F, ¶¶ 3-6, 9-10)].
170. By the spring of 2011, Glidewell REDACTED had already spent about promoting its goods under the BruxZir mark.	[Dkt. #90-1 (Shuck Decl., Ex. G, ¶ 15)].
171. In connection with its brand selection process, Keating, among other things, (1) commissioned a trademark search report, (2) performed an "extensive review of dental journal advertisements by other dental labs," (3) conducted an "informal trademark search for 'KDZ' and 'bruxer,'" and (4) an "informal survey current Keating clients in March/April 2011"	[Dkt. #90-1 (Wong Decl., Ex. P, ¶ 12), Dkt. #90-30 (Ex. 84, (92:15-93:7))]; [Dkt. #90-1 (Wong Decl., Ex. P, ¶ 9), Dkt. #90-30 (Ex. 81)].
172. At least Robert Brandon, Keating's General Manager of the Laboratory, reviewed the search report during the brand selection process.	[Dkt. #90-1 (Wong Decl., Ex. P, ¶ 12), Dkt. #90-30 (Ex. 84, (93:4-11))].

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1 Dated: November 26, 2012

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Glidewell Laboratories v. Keating Dental Arts, Inc.
United States District Court, Central, Case No. SACV11-01309-DOC (ANx)

CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2012, I electronically filed the document described as **JAMES R. GLIDEWELL DENTAL CERAMICS, INC.'S STATEMENT OF GENUINE DISPUTES IN RESPONSE TO DEFENDANT KEATING DENTAL ARTS, INC.'S PROPOSED STATEMENT OF UNCONTROVERTED FACTS IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT OF (1) NO INFRINGEMENT OF GLIDEWELL'S REGISTERED TRADEMARK, (2) NO VIOLATION OF SECTION 43(a) OF THE LANHAM ACT, AND (3) NO UNFAIR COMPETITION UNDER CALIFORNIA LAW** with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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